Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NICHOLAS KNAPP,

Petitioner,

v.

NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICK TAYLOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit Court of Appeals erred in ruling, contrary to the holdings of this Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), the Ninth Circuit Court of Appeals in *Mantolete v. Bolger,* 767 F.2d 1416 (9th Cir. 1985), and numerous other circuit and district courts, that even where a disabled person has established as a matter of fact that he is qualified to perform a program or activity under the Rehabilitation Act of 1973, as amended (29 U.S.C. §794 *et seq.*) ("the Rehabilitation Act"), the trial court should abdicate its role as the finder of fact on the issue of "otherwise qualified" and defer to the federal grantee's exclusion decision so long as that decision was not unreasonable?

2. Whether a person who is regarded by a federal grantee as having a permanent life-threatening cardiovascular condition, based upon that individual's record of impairment, including the implantation of an internal defibrillator in his abdomen, is "disabled" for purposes of seeking the protection of the Rehabilitation Act?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nicholas Knapp ("Knapp") respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Seventh Circuit was entered on November 22, 1996 and is reported at 101 F.3d 473 (7th Cir. 1996). The opinion is reproduced in Appendix A ("App."). By order dated January 3, 1997, the Seventh Circuit denied plaintiff's petition for rehearing with suggestion for rehearing *en banc*. App. B.

The district court's decision granting plaintiff's motion for permanent injunction issued on September 9, 1997 is reported at 938 F. Supp. 508 (N.D. Ill. 1996) and is reprinted in Appendix C. The district court's decision denying defendants' motion for reconsideration, issued on September 25, 1996, was not published and is reprinted in Appendix D. The district court's September 26, 1996 Order and Judgment Granting Permanent Injunction was not published and is reprinted in Appendix E. On October 7, 1996, the district court issued a consolidated memorandum opinion and order which is reported at 942 F. Supp. 1191 (N.D. Ill. 1996) and is reprinted in Appendix F.[1]

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[1] Unless otherwise stated, Knapp will only refer to the district court's consolidated opinion and memorandum order. App. F.

JURISDICTION

The judgment of the Seventh Circuit Court of Appeals on which this Petition is based was entered on November 22, 1996. App. A. The plaintiff's petition for rehearing with suggestion for rehearing *en banc* was denied on January 3, 1997. App. B. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This case involves Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794(a)), which provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 U.S.C. § 706 (8)], shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal Financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 706(8)(B) defines a disabled individual as:

> any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

STATEMENT OF THE CASE

I. Factual Background

On September 19, 1994, while a senior in high school, Knapp suffered ventricular fibrillation, a life-threatening abnormal heart rhythm which can result in sudden death. He was resuscitated at that time by emergency medical technicians. Knapp, who was ranked number one in his class academically and considered to be one of the top basketball players in the State of Illinois, was hospitalized for approximately ten days, during which time his physicians implanted an automatic cardioverter defibrillator in his abdomen. Northwestern University, with knowledge of Knapp's condition, agreed to honor a prior oral commitment and signed him to a National Letter of Intent to attend Northwestern and to play intercollegiate basketball.

After Knapp enrolled at Northwestern for the 1995-96 academic year, the school's team physician, an orthopedic surgeon, declared Knapp permanently ineligible to play because of his conclusion that Knapp has as high as a 25 percent annual risk of a second cardiac event leading to sudden death regardless of whether he plays basketball and that playing basketball would substantially and unacceptably increase that risk for Knapp. Northwestern admits that it will not allow Knapp to play intercolle-

giate basketball for the school so long as he remains a student there.[2]

Since Knapp's cardiac arrest in 1994, cardiologists have been unable to find anything physically wrong with his heart. For more than two years now, like many persons who have had a cardiac event and received an implantable defibrillator, Knapp engages in high-intensity exercise: he plays competitive basketball, lifts weights and runs on a daily basis. He has not had one symptom of any cardiovascular problem. The intensity at which Knapp has played basketball during this time is no different than that which would be required of him to play on Northwestern's basketball team. Each of the highly respected cardiologists who has examined Knapp since his graduation from high school is of the opinion that it is appropriate for him to play intercollegiate basketball and that the risk of injury to him from participation would not be substantial.

II. Proceedings In The District Court

Knapp filed this complaint, subsequently amended, on November 7, 1995 against Northwestern and its Director of Athletics, Rick Taylor (collectively, "Northwestern"). In his First Amended Complaint, Knapp alleged that Northwestern's permanent exclusion of him from its basketball

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[2] Northwestern did not dispute either that it receives Federal financial assistance or that it is subject to the Rehabilitation Act. Knapp is in the process of completing his sophomore year at Northwestern. Under the applicable rules, he still has four more years of athletic eligibility.

program violates Section 504 of the Rehabilitation Act. Knapp sought injunctive relief and monetary damages.[3]

In September 1996, the district court held an evidentiary hearing on Knapp's request for a permanent injunction, which hearing related specifically to Knapp's medical condition as he began the 1996-97 academic year. Following that hearing, the district court denied Northwestern's motion for summary judgment and found that Knapp was "disabled" under the Rehabilitation Act. The district court further ruled that Knapp had proved, through various expert cardiologists, that he was "otherwise qualified" to participate in the activity of intercollegiate basketball. Based upon these findings, the district court enjoined Northwestern from continuing to exclude Knapp from its basketball team. 942 F. Supp. 1191 (N.D. Ill. 1996). App. C - F.

III. Proceedings In The Court of Appeals

After granting Northwestern's request to stay enforcement of the district court's injunction order and entering an expedited briefing schedule, the Seventh Circuit reversed the district court's decision on the grounds that Knapp is not "disabled" under the Rehabilitation Act, and that even if he were disabled, the district court com-

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[3] Knapp also alleged in a separate count that defendants' exclusion constituted a *de facto* expulsion of him from the National Collegiate Athletic Association and the Big Ten Conference in violation of his common law right under Illinois law to rudimentary due process. The district court granted defendants' motion to dismiss this additional claim on the ground that it failed to state a cause of action. The claim is not relevant to this Court's consideration of the instant Petition.

mitted reversible error when it weighed the conflicting testimony of the parties' medical witnesses concerning the nature of any increased risk to which Knapp would be exposed by playing basketball. Instead, according to the Seventh Circuit, the district court should not have acted as the finder of fact as to whether a disabled individual is otherwise qualified, but should have limited its role to determining merely whether the federal grantee, Northwestern, had acted reasonably based upon competent medical evidence, thereby deferring to Northwestern's decision to exclude Knapp. The Seventh Circuit remanded the case to the district court with instructions to enter summary judgment in Northwestern's favor. 101 F.3d 473 (7th Cir. 1996). App. A. Plaintiff's petition for rehearing with suggestion for rehearing *en banc* was denied on January 3, 1997. App. B.

REASONS FOR GRANTING WRIT

THE SEVENTH CIRCUIT'S DECISION IS CONTRARY TO THIS COURT'S HOLDING IN *ARLINE* AND THE HOLDING OF OTHER CIRCUIT COURTS OF APPEAL, AND UNDERMINES THE PURPOSE OF THE REHABILITATION ACT BY REQUIRING THE TRIAL COURT TO ABDICATE ITS ROLE AS THE FINDER OF FACT AND TO DEFER TO THE FEDERAL GRANTEE'S DETERMINATION WITH RESPECT TO THE ISSUE OF WHETHER A DISABLED PERSON IS "OTHERWISE QUALIFIED" TO PERFORM AN ACTIVITY. THE DECISION ALSO IMPROPERLY NARROWS THE DEFINITION OF WHO IS "DISABLED", DENYING THE APPLICATION OF THE REHABILITATION ACT TO THOSE PERSONS IT WAS ESTABLISHED TO PROTECT.

I. INTRODUCTION

The Seventh Circuit's holding that a trial court should not decide the question of whether a disabled person is "otherwise qualified", even when it finds that the individual is qualified to perform an activity, conflicts with the decisions of this Court and other circuit courts. This Court and other circuit courts have all held that the trial court, in applying the Rehabilitation Act, must make the ultimate determination whether a risk of injury allegedly posed by inclusion of a disabled person is "significant". This conflict mandates that the writ be granted and that this question, which goes to the foundation of the Rehabilitation Act (and similar anti-disability discrimination laws) be resolved.

The Court should also grant the writ because the Seventh Circuit's holding that Knapp is not "disabled" under the Rehabilitation Act, is inconsistent with the statutory language, the applicable regulations, and the decisions of this Court and other courts. Under the Seventh Circuit's analysis, a person is not entitled to seek the protection

of the Rehabilitation Act when the federal grantee regards the excluded individual as having a permanent life-threatening cardiovascular disease that creates an enormously high probability that the individual could have a cardiac arrest and die whether or not he participates in the activity from which he is excluded. Moreover, the Seventh Circuit's decision holds that this person is not covered by the Rehabilitation Act even when he is barred from participating in an activity which Congress, the courts, the trial court here, the federal grantee, and the excluded individual all deem to be an essential component of the major life activity of learning.

II. THE SEVENTH CIRCUIT'S HOLDING THAT THE TRIAL COURT SHOULD DEFER TO THE FEDERAL GRANTEE'S EXCLUSION DECISION SO LONG AS IT IS REASONABLY MADE AND BASED UPON COMPETENT MEDICAL EVIDENCE, EVEN WHEN THE DISABLED PERSON PROVES THAT HE IS "OTHERWISE QUALIFIED", CONFLICTS WITH THE STATUTORY LANGUAGE OF THE REHABILITATION ACT, AND THE DECISIONS OF THIS COURT AND OTHER CIRCUIT AND DISTRICT COURTS.

A. The Seventh Circuit's Decision Conflicts With This Court's Decisions And Undermines The Purpose Of The Rehabilitation Act.

Section 504(a) of the Rehabilitation Act (29 U.S.C. §794(a)) provides that "no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, *be excluded from the participation* . . . or be subjected to discrimination under any program or activity receiving Federal Financial assistance. . . ." (emphasis added). This Court has held that an otherwise qualified

person is one who is able to meet, with or without reasonable accommodation, all of a program's requirements in spite of his or her disability. *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979); *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987).

No one disputes that Knapp has the skills today to play intercollegiate basketball. His "impairment" does not hinder his ability to perform any task required of an intercollegiate basketball player and he does not seek any special accommodation or preferential treatment. The question raised by this case is what role the trial court should play when there is conflicting evidence as to whether a disabled individual's participation in a program or activity creates a significant risk of substantial injury.

This Court provided the answer to this inquiry in *Arline*, which involved the right of a school board to terminate a teacher because of her susceptibility to tuberculosis, a contagious disease. In affirming the Eleventh Circuit Court of Appeal's decision, the Court provided meaningful protection to disabled persons from unwarranted discrimination by holding that it is the trial court's responsibility, not the responsibility of defendants who seek to exclude individuals with disabilities from participation, to make independent findings of fact as to the legitimacy of a grantee's concern of future risk and to determine specifically, "based on reasonable medical judgments": (1) The nature of the risk; (2) the duration of the risk; (3) the severity of the risk; and (4) the probability that the injury or harm will occur and the varying degrees of severity if it does occur. 480 U.S. at 288.

The Seventh Circuit has departed from the *Arline* standard by holding that the trial court's only inquiry should be whether the federal grantee's exclusion decision is reasonably made and based upon competent medical evidence, without regard to the validity of any conflicting evidence presented by the disabled individual. This new standard is little more than a method to explore the alleged discriminator's motive. However, this Court has already made clear that the federal grantee's intent in excluding the disabled person is irrelevant since good faith or lack of bad motive are not defenses to a claim under the Rehabilitation Act. *Alexander v. Choate*, 469 U.S. 287, 294-301 (1985). The question is not motive; it is, as stated in *Davis*, whether the disabled person can perform the activity at issue in spite of his alleged handicap. *See* 34 C.F.R § 104.3, App. A(5), at 36.[4]

In the short amount of time since *Knapp* was decided, the Seventh Circuit's new standard has already been attacked. As one district court observed (*Mendez v. Gearan*, 1997 U.S. Dist. LEXIS 1594 at 20 n. 9 (N.D. Cal. February 13, 1997):

> The Knapp decision would not have the Court make an independent determination of whether sub-

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[4] While this Court stated in *Arline*, 480 U.S. at 284-85, that one purpose of the Rehabilitation Act is to prohibit exclusion based upon reflexive or stereotypical judgments, it did not suggest that this was the Act's sole purpose. An equally important goal is inclusion and integration (29 U.S.C. § 701(b)) so as to allow disabled persons to live as fully as they are able (*Poole v. South Plainfield Board of Education*, 490 F. Supp. 948, 953-54 (D. N.J. 1980)) and to have an equal opportunity to participate in the activities offered by a federal grantee. *Davis v. Meese*, 692 F. Supp. 505, 520. (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989).

stantial risk and severity of injury is actually risked. *Knapp*, 101 F.3d at 484. Instead, Knapp holds that the "place of the court in such cases is to make sure that the decision-maker has reasonably considered and relied upon sufficient evidence specific to the individual and the potential injury, not to determine on its own which evidence it believes is persuasive." *Knapp*, 101 F.3d at 484. While an examination into the evidence relied upon by a decision-maker is important, a district court must also be permitted to determine whether "in light of [a plaintiff's] work history and medical history, employment of her would pose a reasonable probability of substantial harm." *Mantolete*, 767 F.2d at 1424.

> The Knapp Court would allow an individual to be excluded from a position solely on the basis of the risk of severe injury if the decision to exclude was supported by substantial evidence. *Such a standard violates the very purpose of the Rehabilitation Act: no individual should be excluded from a position when he/she can meet all of a program's requirements in spite of his/her disability. See Davis*, 442 U.S. at 406. *Consequently, if a decision-maker unnecessarily excludes an individual on the basis of a disability, that decision should be overturned, regardless of the sufficiency of the evidence upon which it was based.* A trier of fact, therefore, ought be permitted, under the Rehabilitation Act to determine if risk of injury caused by a disability is such that the individual has been needlessly excluded from participating in an activity. (emphasis added).

Thus, even though the district court here noted that Northwestern may have made a "rational decision that Knapp's risk is substantial based on reasonable evidence" (App. F-13), it correctly concluded that deference to the opinions of Northwestern's doctors (or expert wit-

nesses) was inappropriate. The district court's recognition that it was to decide the issue of the substantiality of the risk when presented with conflicting medical evidence is consistent with the plain language of Section 504, the regulations issued under it, and the decisions of this Court. The same cannot be said for the Seventh Circuit's decision and, for these reasons, the writ should be granted.

B. The Seventh Circuit's Decision Conflicts With The Decisions Of Other Circuit And District Courts.

Further justification for the granting of the Petition is found in the clear conflict that now exists between the Seventh Circuit's decision and the decisions of other circuit and district courts.

In *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985), the Ninth Circuit held, contrary to the Seventh Circuit:

> [A]lthough it is the employer who must make a substantial gathering of necessary facts, *the determination of whether the employer violated [the Rehabilitation Act] is to be made by the trial court de novo.* Therefore, a good faith or rational belief on behalf of the employer will not be a sufficient defense to an act of discrimination. (emphasis added).

767 F.2d at 1423. The Ninth Circuit then remanded that case to the district court "for a determination of whether, in light of [the plaintiff's] work history and medical history, employment of her would pose a reasonable probability of substantial harm." *Id.* at 1424. *See Chalk v. United States District Court*, 840 F.2d 701, 705 (9th Cir. 1988) (trial court's responsibility to conduct *de novo* assessment of the significance of the potential risk of

participation). The Seventh Circuit's decision conflicts with that of the Ninth Circuit on this issue.[5]

The Seventh Circuit's decision also conflicts with numerous decisions of other circuit and district courts which have held that the trial court's duty is to weigh the evidence and determine whether the risk is sufficient to justify exclusion. *See Doe v. New York University*, 666 F.2d 761, 779 (2d Cir. 1981); *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991);[6] *Wood v. Omaha Sch. Dist.*, 25 F.3d 667, 669 (8th Cir. 1994); *Pushkin v.*

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[5] The Seventh Circuit incorrectly suggests (App. A-16) that its decision is consistent with *Mantolete*. The Ninth Circuit did state (767 F.2d at 1422) that in determining whether there is sufficient risk to justify exclusion the "employer must gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of potential injury." However, although the failure to conduct such an inquiry may provide evidence of a violation of the Rehabilitation Act, the Ninth Circuit ruled that the trial court is still required to make a *de novo* determination as to whether the risk to the disabled person from participation is substantial. The Seventh Circuit's decision departs from and ignores the essential component of the Ninth Circuit's holding.

[6] *See Rizzo v. Learning Center, Inc.*, 84 F.3d 758, 764 (5th Cir. 1996), discussing the role of the trial court under the American with Disabilities Act (42 U.S.C. § 12133(b)), in assessing the "direct threat" posed to school children from a hearing impaired school bus driver:

> Whether one is a direct threat is a complicated, fact intensive determination, not a question of law. To determine whether a particular individual performing a particular act poses a direct risk to others is a matter for the trier of fact to determine after weighing all of the evidence about the nature of the risk and the potential harm.

Regents of the University of Colorado, 658 F.2d 1372, 1390 (10th Cir. 1981).[7]

In contrast to the above cases, the Seventh Circuit's decision is without any meaningful support.[8]

C. The District Court Should Not Have To Defer To A Federal Grantee's Exclusion Decision Premised Upon The Opinions Of Private Physicians.

This Court in *Arline* stated that the trial court should normally defer to the reasonable medical judgment of independent public health officials when determining the risk of injury in a Section 504 claim. 480 U.S. 273, 288 n.18. However, it does not follow that the same deference

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[7] District Court decisions which are in conflict with the Seventh Circuit's decision include: *Poole v. South Plainfield Board of Education*, 490 F. Supp. 948 (D. N.J. 1980); *Wright v. Columbia University*, 520 F. Supp. 789, 793 (E.D. Pa. 1981); *Grube v. Bethlehem Area School District*, 550 F. Supp. 418 (E.D.Pa. 1982); *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989); *EEOC v. Kinney Shoe Corp.*, 917 F. Supp. 419 (W.D. Va. 1996) (determination under ADA of threat posed to plaintiff with epilepsy to be decided by trial court even where defendant employer claims it made an "individualized assessment" of plaintiff's condition), *aff'd*, 104 F.3d 683 (4th. Cir. 1997).

[8] The only case which supports the Seventh Circuit is *Pahulu v. University of Kansas*, 897 F. Supp. 1387 (D. Kan. 1995). In *Pahulu*, the district court addressed the issue of the risk to a student from further participation in intercollegiate football as a result of a spinal deformity. In one sentence, without citation, it held that all a grantee must show is that its decision was rationale and based upon competent medical evidence. This unsupported sentence should not form the foundation for an appellate court decision which overrules *Arline* and redefines the rights of disabled individuals under the Rehabilitation Act.

should be given to the opinions of a grantee's private medical witnesses.

Deference to the reasonable medical decisions of public health officials is sensible because these specially appointed medical officials have no bias in favor of any of the litigants and have a duty to make decisions and recommendations in the interest of protecting the health and safety of the general public. Their opinions on questions such as the dangers presented to the general public by contagious diseases may be necessary and persuasive. Here, however, public health officials had no role in the case since playing basketball creates a risk for no one other than Knapp.[9] *Cf. Davis v. Meese*, 692 F. Supp. 505, 520. (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989) (neither opinions of private physicians of federal grantee

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[9] A district court may give weight to the general guidelines of a national conference of a group of private physicians like those promulgated by the participants of the 26th Bethesda Conference and set forth in a document entitled the "Recommendations for Determining Eligibility for Competition in Athletes with Cardiovascular Abnormalities." The district court here gave serious consideration to those general recommendations. This should not mean, however, as the Seventh Circuit now holds, that the trial court must defer to the recommendations of a private medical conference or private physicians upon which the grantee claims to rely, especially when the disabled person has proven through competent evidence that the activity does not create a substantial risk of injury to him. At trial, Knapp successfully exposed the lack of scientific data relied upon by the 26th Bethesda Conference participants for those recommendations which arguably applied to him and the overly restrictive attitudes upon which those recommendations were based. In addition, Knapp introduced significant medical evidence through other well-respected cardiologists which the trial court ultimately found to be more persuasive as it concerned Knapp's situation.

or disabled person entitled to preferential deference, and the role of the trial court is to weigh conflicting evidence to determine risk). If the Court deems the issue of the amount of "deference" to be given to private physicians to be an open one, it is a ripe question which should now be addressed in the face of the glaring conflict between the Seventh Circuit and the other circuits on this question.

D. The Seventh Circuit's Decision Will Have Serious Consequences With Respect To The Rights Of Disabled Persons.

The impact the Seventh Circuit's decision will have upon the rights of disabled individuals to seek redress against wrongful exclusion from activities for which they are qualified to perform in spite of their disability supports the granting of the writ. The Seventh Circuit states (App. A-20 to A-21) that it will now be the "rare case" involving the participation in athletics where a disabled person will be able to attack an exclusion decision. The Seventh Circuit, however, underestimates the consequences of its holding. Not only will it be the rare case where athletic participation is involved when an exclusion decision can be attacked, but also it will be the rare case that any disabled individual, in any context, will be able to prevail under the Rehabilitation Act. Stated differently, the Seventh Circuit has undermined the purpose of the Rehabilitation Act by creating, in essence, an irrebuttable presumption supporting exclusion which disabled persons will only be able to overcome in the most heinous of cases where bad intent is patent.

The Seventh Circuit's decision improperly favors the interests of the federal grantee over those of a disabled

person who is otherwise qualified, but is excluded solely on the basis of his perceived disability. The policy underlying the Rehabilitation Act mandates, as this Court in *Arline* and other circuit and district courts have held, that the disabled individual have the right to introduce at trial competent medical evidence that he or she is qualified to participate, and that it is for the trial court, not the federal grantee, to determine whether the level of risk is sufficient to justify exclusion. This important national issue of federal law requires that certiorari be granted.

III. THE SEVENTH CIRCUIT'S HOLDING THAT KNAPP IS NOT DISABLED WILL DENY THE PROTECTION OF THE REHABILITATION ACT OF 1973 (AND OTHER ANTI-DISCRIMINATION ACTS) TO A BROAD RANGE OF PEOPLE WHO ARE EXCLUDED FROM PARTICIPATING IN FEDERALLY FUNDED ACTIVITIES BECAUSE THEY HAVE OR ARE REGARDED AS HAVING PERMANENT LIFE-THREATENING CONDITIONS.

A. The Seventh Circuit's Decision Denies The Protection Of The Rehabilitation Act To A Person Whom A Federal Grantee Regards, Based Upon His Prior Record of Cardiac Arrest, As Having A Permanent Life-Threatening Cardiovascular Impairment That Could Cause Him To Cease All Life Functions At Any Time.

29 U.S.C. § 706(8)(B) defines a disabled individual as:

> any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

The absurdity of holding that someone like Knapp is not entitled to seek the protection of the Rehabilitation Act is revealed by the Seventh Circuit's recognition (App. A-8) of the all-encompassing impairment which Northwestern perceives him as having:

> The "disability" Knapp claims is the basis for discrimination against him is not a continuing one like blindness or deafness. At any given moment in time when Knapp's heart is functioning properly his disability does not affect him. He is truly disabled only when his heart stops, which may or may not happen to him again. The disability regarding which Northwestern allegedly discriminates, therefore, actually is the greater risk of harm for Knapp than the risk faced by other male college basketball players. *In addition, other impairments usually do not have as severe a result as is possible in this case.* A person who is deaf, for instance, will not suddenly die on the basketball court because of that disability. Here, Knapp's disability is all or nothing. Finally because Knapp's disability affects one of the most central organs of the body, his disability to some extent effects *all* major life activities—if his heart stops, he will not breathe, see, speak, walk, learn, or work. *Once again it is all or nothing—either his heart is functioning and no major life activities are limited at that moment, or it has stopped and the most major life activity of all—living—has been affected.* (emphasis added).

This evidence, which is present throughout the trial court record, should have resulted in the Seventh Circuit's affirmance, not the reversal, of the trial court's decision that Knapp is disabled and entitled to seek protection under the Rehabilitation Act.

According to Northwestern, someone with "idiopathic ventricular fibrillation" (the condition which Northwestern ascribes to Knapp and which indicates a heart that experienced ventricular fibrillation without identifiable cause) will always be at significantly greater risk to have a second event than the normal person. Northwestern claims that Knapp is like a walking time bomb who has as much as a 25 percent annual risk of a recurrent ventricular fibrillation. Most important, Northwestern's assessment of the level of Knapp's risk assumes he does not even play intercollegiate basketball. In other words, Northwestern perceives Knapp as having as much as 25 percent annual risk of having a second cardiac event if all he does is stay at home and watch television. Northwestern asserts that playing basketball would increase Knapp's risk of a second event.[10]

The fact that Knapp's implantable defibrillator (a type of prosthetic device) is designed to restore a ventricular

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[10] Knapp proved that Northwestern's perception of him as having as much as a 25 percent annual risk of having a second cardiac event was incorrect and that the very small risk of a second event while playing basketball is minimized by the presence of his implantable defibrillator. However, it is Northwestern's (incorrect) view of Knapp as someone who has a condition which causes him to have an incredibly high probability of having a second cardiac event and dying which renders him "disabled" and requires that he receive the protection of the Rehabilitation Act. *See Scharff v. Frank*, 791 F. Supp. 182, 184-85 (S.D. Ohio 1991) (employer's perception of plaintiff controlling with respect to issue of "substantial limitation"). Northwestern also has taken the position that no person with an implantable defibrillator should play intercollegiate basketball. This assertion goes solely to the issue of whether Knapp is "otherwise qualified" to play intercollegiate basketball, not to whether he is disabled.

fibrillation to normal rhythm (studies show a success rate of 99 percent) should not have precluded him from seeking relief under the Rehabilitation Act as a disabled person. 29 C.F.R. § 1630.2(j), App. at 339-40 ("The determination of whether an individual is [disabled] must be made . . . without regard to mitigating measures such as medicines, or assistive or prosthetic devices"). Northwestern's exclusion decision, based in significant part on the fact that physicians determined that Knapp's condition required that he have a defibrillator implanted in his abdomen, renders Knapp the very disabled person the Rehabilitation Act is meant to cover.

Knapp's disability, as Northwestern perceives it, is like the disability of someone who has AIDS or is HIV positive—diseases which may not show outward indices of impairment, but are deemed to be "inherently substantially limiting." 29 C.F.R. §1630.2(j), App. at 339 ("Other impairments, however, such as HIV infection, are inherently substantially limiting"). Congress, which intended that the term "disability" under the Americans with Disabilities Act have the same meaning as the term "handicap" under the Rehabilitation Act, considered heart disease to be "inherently disabling." *See Finley v. Cowles Business Media*, 1994 U.S. Dist. LEXIS 8205, at 5-7 (S.D.N.Y. 1994).[11] The Seventh Circuit's decision, while explicitly recognizing the inherently disabling nature of Knapp's perceived physical impairment,

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[11] In that case, the court noted that the legislative history of the ADA indicates that Congress considered heart disease to be inherently disabling and that, as such, the plaintiff's chronic heart disease constituted an impairment "which rises to the level of a disability." *Finley*, 1994 U.S. Dist. LEXIS 8205, at 6-7.

ignores Congress' intent by its improper finding that Knapp is not "disabled" under the Rehabilitation Act.

B. Northwestern's Reliance Upon Knapp's Prior Cardiac Arrest, Hospitalization, And Implantation Of A Defibrillator, Required A Finding That Knapp Is "Disabled" Under This Court's Decision In *Arline*.

In coming to its perception of Knapp's current medical condition, Northwestern relied upon Knapp's prior medical record of his cardiac arrest, his hospital record, including the implantation of his defibrillator ("record of impairment") to justify his permanent exclusion from its basketball program. 29 U.S.C. § 706(8)(B)(ii).

In *School Board of Nassau County v. Arline*, 480 U.S. 273, 284 (1987), this Court held that the hospitalization of the plaintiff for tuberculosis many years prior to her exclusion was more than sufficient to establish the substantial limitation of a life activity and that she was entitled to seek the protection of the Rehabilitation Act, without regard to her condition at the time of exclusion. Regulations promulgated under the Rehabilitation Act cite a record of heart disease as an example of a condition which establishes a "record of impairment" that substantially limits a major life activity. 34 C.F.R. § 104, App. A at 355. *See Keller v. Western-Southern Life Ins. Co.*, 881 F. Supp. 1559, 1561 (M.D. Fla. 1995) (plaintiff's cardiovascular condition constituted a "record of impairment" which rendered him "disabled" under the ADA (which has virtually an identical definition of "disability" (42 U.S.C. § 12102(2)) as the Rehabilitation Act).

In this case, Knapp, like the plaintiff in *Arline*, was hospitalized for a substantial period of time following his

ventricular fibrillation during which he had a defibrillator implanted in him. Furthermore, Knapp, like Arline, was excluded from a protected activity as a result of the federal grantee's perception of him, the source of which was Knapp's medical record. The Seventh Circuit, however, disregarded without explanation the *Arline* holding in concluding that Knapp is not "disabled."

C. The Petition Should Be Granted Because The Seventh Circuit's Decision Conflicts With Numerous Authorities And The Uncontradicted Evidence That Interscholastic And Intercollegiate Athletics May Constitute An Essential Element Of The Major Life Activity Of Learning.

Whether a person is "disabled" (*i.e.*, has an impairment which substantially limits a major life activity) is an individualized determination, to be decided on a case-by-case basis. *Homeyer v. Stanley Tulchin Associates, Inc.*, 91 F.3d 959, 962 (7th Cir. 1996); *Byrne v. Bd of Ed School of West Allis-West Milwaukee*, 979 F.2d 560, 565 (7th Cir. 1992); *Sandison v. Michigan High School Athletic Ass'n*, 863 F. Supp. 483, 488 (E.D. Mich. 1994), *rev'd on other grounds and dismissed in part*, 64 F.3d 1026 (6th Cir. 1995).

In this case, the district court, consistent with the holdings of numerous other courts, and consistent with the applicable statute and regulations, concluded Knapp is disabled under the Rehabilitation Act. By conducting an individualized inquiry and by examining the role of competitive athletics in the educational experience of students like Knapp, the district court correctly ruled that if Knapp's perceived medical condition caused him to be excluded from intercollegiate basketball, that ex-

clusion had caused Knapp to lose an essential and irreplaceable component of his major life activity of learning. App. F-4 to F-7.

The Seventh Circuit, without case law or statutory support, expressed its lack of regard for the importance of intercollegiate athletics by reversing the district court's decision (App. A-13 to A-14) on the ground that "learning through playing intercollegiate basketball is only one part of the education available to Knapp" and, as such, "Knapp's ability to learn is not substantially limited." This perspective radically understates and undervalues the importance of school athletics to the educational experience and is inconsistent with Congress' and other courts' view of the role of interscholastic and intercollegiate sports.

For many years, federal courts have held that athletics are not just important, but are an integral ingredient in a well-rounded curriculum. *See, e.g., Cape v. Tennessee Secondary Sch. Ath. Ass'n*, 424 F. Supp. 732, 743 (E.D. Tenn. 1976), *rev'd on other grounds*, 563 F.2d 793 (6th Cir. 1977); *Brenden v. Independent School District 742*, 477 F.2d 1292, 1298 (8th Cir. 1973) (interscholastic athletics found to be an integral facet of the education process). Similarly, by enacting laws like Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*, Congress has recognized the essential nature of athletics to the activity of learning by requiring equal opportunities for women in school athletics programs.[12]

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[12] The evidence introduced at trial indicated that over the last decade, an average of approximately 3 million young men and women participate each year in organized high school and college athletics in the United States.

Further indicia that Congress intended intercollegiate athletics to be considered an integral part of the major life activity of learning is reflected by the regulations implementing the Rehabilitation Act promulgated by the Department of Health and Human Services and the Department of Education, both of which prohibit discrimination against otherwise qualified disabled persons in connection with intercollegiate athletics. *See* 34 C.F.R. § 104.47(a) and 45 C.F.R. § 84.47(a).

Moreover, it is undisputed that it is Northwestern's and the National Collegiate Athletic Association's express policy that intercollegiate athletics constitute an integral component of the higher education experience for the hundreds of thousands of college students like Knapp. As the district court found (App. F-5 to F-6), Knapp's own experience confirms the essential role interscholastic athletics have played and intercollegiate athletics would play in his major life activity of learning. The Seventh Circuit's decision conflicts with the view of almost every other court and commentary which has concluded that interscholastic or intercollegiate athletics constitute an essential element of the major life activity of learning and exclusion from them as a result of a permanent physical impairment (real or perceived) provides a basis for application of the Rehabilitation Act.[13]

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[13] See, e.g., *Sandison v. Michigan High School Athletic Ass'n, Inc.*, 863 F. Supp. 483, 488 (E.D. Mich. 1994) ("Because participation on the cross-country and track team is an important and integral part of the education of plaintiffs, it is as to them a major life activity"); *see also Poole v. South Plainfield Bd. of Education*, 490 F. Supp. 948, 954 (high school student with one-kidney unlawfully discriminated against under the Act by

(continued...)

The Seventh Circuit's comments (App. A-13 to A-14) that "the inability to play intercollegiate basketball at Northwestern forecloses only a small portion of [Knapp's] collegiate opportunities" and that (App. A-9 to A-10) many students obtain a diploma without having played intercollegiate athletics reflect not only a stereotypical bias against such activities, but also, and more important, do not answer the question of whether Northwestern's exclusion of Knapp is a substantial limitation of his "learning."

Not every student plays or is interested in participating in school-sponsored athletics. This, however, should not translate to a *per se* rule of law that exclusion of a person with a serious physical impairment from an athletic program can never constitute a substantial limita-

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[13] (...continued)
preclusion from interscholastic wrestling); *Wright v. Columbia University*, 520 F. Supp. 789, 793, 795 (E.D. Pa. 1981) (same for one-eyed plaintiff barred from playing intercollegiate football), *Grube v. Bethlehem Area School District*, 550 F. Supp. 418 (E.D. Pa. 1982) (high school student with one-kidney unlawfully discriminated against under the Act by preclusion from interscholastic football); Jones, "College Athletes: Illness or Injury and the Decision to Return to Play," 40 *Buff. L. Rev.* 113, 178-180 (1992) ("There can be little doubt that an athlete who has suffered a serious injury or illness and is precluded from playing because of that condition is an 'individual with [disabilities]' as defined by Section 504"); Mitten, "Sports Participation by 'Handicapped' Athletes," 10-SPG *Ent. & Sports Law* 15, 17 (1992) ("athletics constitutes a 'major life activity' for many people"); *but see Pahulu v. University of Kansas*, 897 F. Supp. 1387 (intercollegiate football is a major life activity because it is an integral part of a student-athlete's learning experience, but denial of participation does not constitute a substantial limitation of that activity).

tion of "learning." "It is the impaired individual that must be examined, and not just the impairment in the abstract." *E.E. Black v. Marshall*, 497 F. Supp. 1088, 1099 (D. Haw. 1980).

Relying on the seminal case of *E.E. Black*, courts of appeal, including the Seventh Circuit, have consistently noted that a person's training and expectations are important factors for the finder of fact to consider in determining whether a physically impaired person is disabled. *See, e.g., Homeyer v. Stanley Tulchin Associates, Inc.*, 91 F.3d 959, 962 (7th Cir. 1996).[14] Applying these factors in this case, the trial court unequivocally found that Knapp's training and expectations established that his exclusion from Northwestern's basketball program would be a substantial deprivation of an integral and irreplaceable component of his major life activity of learning. App. F-4 to F-6.[15]

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[14] *See Huber v. Howard County, Maryland*, 849 F. Supp. 407, 412 (D. Md. 1994), *aff'd per curiam*, 56 F.3d 61 (4th Cir. 1995) (Plaintiff, with severe breathing problems, who trained to be firefighter for eight years by being volunteer firefighter, found to be disabled under the Act even if could have found jobs in other areas of employment); *Homeyer*, 91 F.3d 959 (plaintiff, a typist, has the right to show her ability to work as a typist in other downtown office buildings was substantially limited because of impairment).

[15] The Petition should also be granted because of the Seventh Circuit's finding that Knapp is not disabled because it is arguably possible that Knapp could attempt to attend and play basketball at another college and/or because he did not submit evidence that other schools view him as Northwestern does. App. A-13 to A-14 n.6. Northwestern does not suggest that Knapp's problem is that he cannot play only in its basketball arena; instead, it asserts that Knapp's condition bars him from

(continued...)

The Seventh Circuit's decision is incorrect because it now prevents the district court from conducting the individualized inquiry the law mandates. Instead, the Seventh Circuit's decision improperly issues a blanket rule of law that exclusion from intercollegiate athletics can never constitute a substantial limitation of a major life activity. The Seventh Circuit's rejection of the majority position on this issue requires this Court's review.

CONCLUSION

For the foregoing reasons, petitioner Nicholas Knapp respectfully requests that this Court grant his Petition for a Writ of Certiorari to resolve these important questions of federal law which impact upon a disabled person's right to seek the equal opportunity to participate in

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[15] (...continued)
playing for any school. Now, under the Seventh Circuit's analysis, the onus is now on the excluded plaintiff to establish that other federal grantees similarly misperceive him in order to establish disability. Such a result creates an automatic defense for any grantee who excludes a qualified individual based upon an improper perception of his condition because the possibility always exists that another grantee will not possess the same misperception. Such a result turns the Rehabilitation Act on its head and the Court should grant the Petition to insure that this conclusion will not be relied upon by other federal grantees to justify inappropriate exclusion.

those activities for which the individual is qualified to perform.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 96-3450

NICHOLAS KNAPP,

Plaintiff-Appellee,

v.

NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICK TAYLOR,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 6454—**James B. Zagel**, *Judge.*

ARGUED NOVEMBER 7, 1996—DECIDED NOVEMBER 22, 1996

Before BAUER, DIANE P. WOOD, and EVANS, *Circuit Judges.*

EVANS, *Circuit Judge.* Nicholas Knapp wants to play NCAA basketball for Northwestern University—so badly that he is willing to face an increased risk of death to do so. Knapp is a competent, intelligent adult capable of assessing whether playing intercollegiate basketball is worth the risk to his heart and possible death, and to him the risk is acceptable. Usually, competent, intelligent adults are allowed to make such decisions. This is especially true when, as here, the individual's family approves of the decision and the individual and his parents are

willing to sign liability waivers regarding the worst-case scenario should it occur.

Northwestern, however, refuses to allow Knapp to play on or even practice with its men's basketball team. Knapp, currently a sophomore at Northwestern, has the basketball skills to play at the intercollegiate level, but he has never taken the court for his team. Although Northwestern does not restrict him from playing pick-up basketball games, using recreational facilities on campus, or exerting himself physically on his own, the university disqualified Knapp from playing on its intercollegiate basketball team. The issue in this case boils down to whether the school—because of § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794—will be forced to let Knapp don a purple uniform and take the floor as a member of Northwestern's basketball team.

Prior to his senior year of high school Knapp was rated among the best basketball players in Illinois. He was recruited by numerous universities, including Northwestern. At the end of Knapp's junior year at Peoria's Woodruff High School, Northwestern orally offered him an athletic scholarship to play basketball. Knapp orally accepted the offer.

A few weeks into his senior year, Knapp suffered sudden cardiac death—meaning his heart stopped—during a pick-up basketball game. Paramedics used cardiopulmonary resuscitation, defibrillation (i.e., electric shocks), and injections of drugs to bring Knapp back to life. A few weeks later, doctors implanted an internal cardioverter-defibrillator in Knapp's abdomen. The device detects heart arrhythmia and delivers a shock to convert the abnormal heart rhythm back to normal. In other words, if Knapp's heart stops again the device is supposed to restart it.

On the day following his sudden cardiac death, Northwestern informed Knapp and his family that whatever the ultimate medical decision, Northwestern would honor its commitment for a scholarship. Seven weeks after his collapse Knapp signed a national letter of intent to attend Northwestern.

Knapp did not play basketball during his senior year in high school, but he was always a superb student, and in June 1995 he graduated as the valedictorian of his class. In September 1995 he enrolled as a Northwestern student.

On November 7, 1995, Dr. Howard Sweeney, Northwestern's head team physician, declared Knapp ineligible to participate on Northwestern's men's basketball team for the 1995-96 school year.[1] Dr. Sweeney based his decision on Knapp's medical records in which several treating physicians recommended that Knapp not play competitive basketball, the report of team physician Dr. Mark Gardner following a physical examination of Knapp, published guidelines and recommendations following two national medical conferences known as the Bethesda Conferences[2]

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[1] Northwestern's Presidential Directive on Self-Regulation of Intercollegiate Athletics, the Big Ten Conference's Handbook Agreements for Men's Programs, and the NCAA's Constitution and Sports Medicine Handbook all give the team physician sole responsibility to decide whether a student is medically eligible to compete on the basketball team.

[2] Two national medical conferences were held in Bethesda, Maryland, for the specific purpose of establishing prudent consensus recommendations among cardiologists and sports medicine physicians regarding the eligibility of athletes with cardiovascular abnormalities to compete in sports. The first, known as the 16th Bethesda Conference, was held in 1984 and titled "Cardiovascular Abnormalities in the Athlete: Recommendations Regarding Eligibility for Competition." The consensus recommendations from that conference were published in the *Journal of the American College of Cardiology* in December 1985. The second, known as the 26th Bethesda Conference and titled "Recommendations for Determining Eligibility for Competition in Athletes with Cardiovascular Abnormalities," was held in January 1994. The consensus recommendations of that conference were published in the *Journal of the American College of Cardiology* in October 1994.

The 26th Bethesda Conference's task force on arrhythmias addressed conditions like Knapp's and implanted cardioverter-defibrillators. This task force recommended that athletes with ventricular fibrillation "that result in cardiac arrest in the presence or absence of structural heart disease cannot participate in any moderate or

(Footnote continued on following page)

regarding eligibility of athletes with cardiovascular abnormalities, and recommendations of physicians with whom Dr. Gardner and Dr. Sweeney consulted. After the basketball season ended, Northwestern and the Big Ten declared Knapp permanently medically ineligible to play basketball. Northwestern's athletic director, Rick Taylor, later confirmed that Northwestern will never voluntarily let Knapp play intercollegiate basketball as a Wildcat.

As a result, Knapp has never practiced with the Northwestern team nor played in a college game. His scholarship nevertheless continues and he attends practices (though he is not allowed to do anything but watch, apparently). He also receives other benefits afforded to athletes (such as tutoring, counseling, and training table), in addition to the full range of academic and nonacademic offerings the university provides to all students.

On the same day Dr. Sweeney declared him ineligible, Knapp filed a complaint in federal district court asserting that Northwestern's actions violated the Rehabilitation Act. The suit sought declaratory relief, preliminary and permanent injunctive relief, and compensatory damages. Knapp's undisputed goal is to force Northwestern to allow him to play varsity basketball.

In May 1996 Northwestern filed a motion for summary judgment, and Knapp thereafter requested a permanent injunction. The district court held a hearing on September 6, 1996, solely to determine whether Knapp presently is medically eligible to play intercollegiate basketball. Presented with conflicting evidence, the district court found Knapp medically eligible and Northwestern in violation of the Rehabilitation Act. After subsequent hearings on the issue of reasonable accommodation, the district

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[2] *continued*
high intensity competitive sports." 24 *Journal of the American College of Cardiology* 845, 897 (1994). "For athletes with implantable defibrillators . . . all moderate and high intensity sports are contraindicated." *Id.*

court denied Northwestern's motion for summary judgment and entered a permanent injunction prohibiting Northwestern from excluding Knapp from playing on its basketball team for any reason related to his cardiac condition.

The district court's decision was based on the affidavit of Knapp and the testimony and affidavits of two experts presented by Northwestern and three experts presented by Knapp. All the experts agreed Knapp had suffered sudden cardiac death due to ventricular fibrillation; even with the internal defibrillator, playing intercollegiate basketball places Knapp at a higher risk for suffering another event of sudden cardiac death compared to other male college basketball players; the internal defibrillator has never been tested under the conditions of intercollegiate basketball; and no person currently plays or has ever played college or professional basketball after suffering sudden cardiac death and having a defibrillator implanted. Northwestern's experts, cardiologists who participated in at least one of the Bethesda conferences, testified that playing intercollegiate basketball significantly and unacceptably increases Knapp's risk of death. At least one of Northwestern's experts stated that individuals with internal defibrillators should not play intercollegiate basketball. Knapp's expert cardiologists, one of whom, Dr. Lawrence Rink, is Knapp's treating cardiologist and an Indiana University basketball team physician, testified that although Knapp is at an increased risk for sudden cardiac death, that risk, especially with the internal defibrillator in place, is insubstantial or at least acceptable.

After tasting defeat in the district court, Northwestern filed an emergency notice of appeal on September 27, 1996. It also sought a stay of enforcement of the injunction. We expedited the proceedings, granted the stay pending this decision, and heard oral arguments on November 7, 1996, ironically one year to the day after Dr. Sweeney first declared that Knapp could not play basketball for Northwestern.

We review the district court's grant of a permanent injunction for abuse of discretion. *United States v. Kaun*,

827 F.2d 1144, 1148 (7th Cir. 1987). Factual determinations are reviewed under a clearly erroneous standard and legal conclusions are given *de novo* review. A factual or legal error may be sufficient to establish an abuse of discretion. *Id.* Interpretation of the Rehabilitation Act presents legal questions calling for *de novo* review.

The Rehabilitation Act, which is the sole basis for Knapp's claim, ensures that

> [n]o otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 USCS § 706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a). To prevail on his claim for discrimination under the Act, Knapp must prove that: (1) he is disabled as defined by the Act; (2) he is otherwise qualified for the position sought; (3) he has been excluded from the position solely because of his disability; and (4) the position exists as part of a program or activity receiving federal financial assistance. *Byrne v. Board of Educ., School of West Allis-West Milwaukee*, 979 F.2d 560, 563 (7th Cir. 1992). Northwestern does not dispute that it receives federal financial assistance and that it has excluded Knapp from its intercollegiate basketball program solely because of his cardiac condition, so our focus is on whether Knapp is an "otherwise qualified individual with a disability."

To show that he is disabled under the terms of the Act, Knapp must prove that he

> (i) has a physical . . . impairment which substantially limits one or more of [his] major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

29 U.S.C. § 706(8)(B). Knapp satisfies the first element of part (i) of this definition. A cardiovascular problem constitutes a physical impairment under § 706(8)(B). 34 C.F.R.

§ 104.3(j)(2)(i)(A); 45 C.F.R. § 84.3(j)(2)(i)(A). Northwestern does not dispute this fact, but it instead zeros in on the second element of the disability definition: whether playing intercollegiate basketball is part of a major life activity and, if so, whether its diagnosis of Knapp's cardiac condition substantially limits Knapp in that activity.

In determining whether a particular individual has a disability as defined in the Rehabilitation Act, the regulations promulgated by the Department of Health and Human Services[3] with the oversight and approval of Congress are of significant assistance. *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 279 (1987); *Byrne*, 979 F.2d at 563. Those regulations define "major life activities" as basic functions of life "such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 34 C.F.R. § 104.3(j)(2)(ii); 45 C.F.R. § 84.3(j)(2)(ii). Regulations regarding equal employment opportunities under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, adopt the same term and definition and an interpretive note provides a bit more guidance: " 'Major life activities' are those basic activities that the average person in the general population can perform with little or no difficulty." 29 C.F.R. pt. 1630, app. § 1630.2.

The regulations promulgated pursuant to the Rehabilitation Act do not define "substantial limitation," and this is not an oversight. In commentary following the regulations, both the Department of Education and the Department of Health and Human Services acknowledge "the lack of any definition in the proposed regulation of the phrase 'substantially limits.' The Department does not believe that a definition of this term is possible at this

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[3] For the most part, the regulations implementing the Rehabilitation Act promulgated by the Department of Health and Human Services are identical to those promulgated by the Department of Education. *Compare* 45 C.F.R. pt. 84 *with* 34 C.F.R. pt. 104. We cite to both.

time." 34 C.F.R. pt. 104, app. A, subpt. A(3); 45 C.F.R. pt. 84, app. A, subpt. A(3). "The court must ask 'whether the particular impairment constitutes for the particular person a significant barrier to [a major life activity].' " *Byrne*, 979 F.2d at 565 (quoting *Forrisi v. Bowen*, 794 F.2d 931, 933 (4th Cir. 1986)).

This case is difficult because it does not fit neatly under the Rehabilitation Act. The "disability" Knapp claims is the basis for discrimination against him is not a continuing one like blindness or deafness. At any given moment in time when Knapp's heart is functioning properly his disability does not affect him. He is truly disabled only when his heart stops, which may or may not happen to him again. The disability regarding which Northwestern allegedly discriminates, therefore, actually is the greater risk of harm for Knapp than the risk faced by other male college basketball players. In addition, other impairments usually do not have as severe a result as is possible in this case. A person who is deaf, for instance, will not suddenly die on the basketball court because of that disability. Here, Knapp's disability is all or nothing. Finally, because Knapp's disability affects one of the most central organs of the body, his disability to some extent affects *all* major life activities—if his heart stops, he will not breathe, see, speak, walk, learn, or work. Once again it is all or nothing—either his heart is functioning and no major life activities are limited at that moment, or it has stopped and the most major life activity of all—living—has been affected.

In any event, the parties here have framed their arguments as involving solely the major life activity of learning. Knapp contends that playing an intercollegiate sport is an integral part of his major life activity of learning and that his education will be substantially limited if he cannot play on the team. He states that he does not believe he can obtain confidence, dedication, leadership, perseverance, discipline, and teamwork in any better way. The district court agreed with him, determining that *for Knapp*, playing on the Northwestern basketball team was

part of the major life activity of learning and that he was substantially limited from such learning by the university.

In their arguments, the parties have separated "substantially limited" and "major life activities" into two independent criteria. We do not believe that such a complete separation should be made, at least in regard to learning and working. A comment on this point by the Sixth Circuit is insightful:

> The court in [citation omitted] treated "substantially limiting" and "major life activity" as distinct statutory qualifications. [Citation omitted.] However, at least with respect to the major life activity of "working", they constitute an inseparable whole. An impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one.

Jasany v. United States Postal Service, 755 F.2d 1244, 1249 n.3 (6th Cir. 1985). We think this same interrelationship applies regarding learning. If playing NCAA basketball reaches a major life activity, then it is likely that deprivation of that activity would, for the individual basketball player, be a substantial limitation. Likewise, if playing intercollegiate basketball does not reach the status of major life activity, then it is most likely that deprivation will not be a substantial limitation.

We do not think that the definition of "major life activity" can be as particularized as Knapp wants it to be. Playing intercollegiate basketball obviously is not in and of itself a major life activity, as it is not a basic function of life on the same level as walking, breathing, and speaking. Not everyone gets to go to college, let alone play intercollegiate sports. We acknowledge that intercollegiate sports can be an important part of the college learning experience for both athletes and many cheering students—especially at a Big Ten school. Knapp has indicated that such is the case for him. But not every student thinks so. Numerous college students graduate each year having neither participated in nor attended an intercollegiate

sporting event. Their sheepskins are no less valuable because of the lack of intercollegiate sports in their lives. Not playing intercollegiate sports does not mean they have not learned. Playing or enjoying intercollegiate sports therefore cannot be held out as a *necessary* part of learning for *all* students.

A few cases, none of them binding on us, have considered school team sports a major life activity in and of themselves. *See Pahulu v. University of Kansas*, 897 F. Supp. 1387 (D. Kan. 1995) (intercollegiate football may be a major life activity); *see also Sandison v. Michigan High School Athletic Ass'n, Inc.*, 863 F. Supp. 483, 489 (E.D. Mich. 1994) (participation on the cross-country and track teams an important and integral part of education and a major life activity), *rev'd on other grounds*, 64 F.3d 1026 (6th Cir. 1995). In other cases involving school athletics, whether they constituted part of the major life activity of learning is not even discussed. *See Grube v. Bethlehem Area Sch. Dist.*, 550 F. Supp. 418 (E.D. Pa. 1982) (disability assumed, so major life activity not discussed); *see also Wright v. Columbia Univ.*, 520 F. Supp. 789 (E.D. Pa. 1981) (parties did not dispute that player was disabled).

Because intercollegiate athletics may be *one part* of the major life activity of learning for *certain* students, the parties here have framed the analysis of what constitutes a major life activity into a choice between a subjective test or an objective test—whether we look at what constitutes learning for Nick Knapp or what constitutes learning in general for the average person. The Rehabilitation Act and the regulations promulgated under it give little guidance regarding whether the determination of what constitutes a major life activity turns on an objective or subjective standard.[4] And while we have previously said that

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[4] Knapp argues that because the regulations contain prohibitions against discrimination in postsecondary athletics, including intercollegiate teams, it follows that such athletics constitute a major life activity. That is not the case. Such regulations have no effect

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whether a person is disabled is "an individualized inquiry, best suited to a case-by-case determination," we have also indicated that "the definition of 'major life activity' in the regulations 'cannot be interpreted to include working at the specific job of one's choice,' " *Byrne*, 979 F.2d at 565. Other courts have been across the board on whether the test is objective or subjective. *Compare Pahulu*, 897 F. Supp. at 1393 ("for Pahulu, intercollegiate football may be a major life activity, i.e., learning"), *and Sandison*, 863 F. Supp. at 489 (participation on high school teams is "as to them a major life activity"), *with Welsh v. City of Tulsa, Okla.*, 977 F.2d 1415, 1417 (10th Cir. 1992) (major life activity of working does not necessarily mean working at the job of one's choice).

We decline to define the major life activity of learning in such a way that the Act applies whenever someone wants to play intercollegiate athletics. A "major life activity," as defined in the regulations, is a basic function of life "such as caring for one's self, performing manual

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[4] *continued*
on the phrase "otherwise qualified with a disability," but rather on the portion of 29 U.S.C. § 794(a) discussing a "program or activity." For instance, 34 C.F.R. § 104.43(a) and 45 C.F.R. § 84.43(a) provide that

> [n]o qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any . . . athletics, . . . other extracurricular, or other postsecondary education program or activity to which this subpart applies[;]

and 34 C.F.R. § 104.47(a) and 45 C.F.R. § 84.47(a) state that

> [i]n providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors *intercollegiate, club, or intramural athletics* shall provide to qualified handicapped students an equal opportunity for participation in these activities.

These regulations apply only after it is determined that the individual is disabled and qualified.

tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 34 C.F.R. § 104.3(j)(2)(ii); 45 C.F.R. § 84.3(j)(2)(ii). These are basic functions, not more specific ones such as being an astronaut, working as a firefighter, driving a race car, or learning by playing Big Ten basketball.

However, major life activities are defined in a more individualized manner during the "substantial limitation" analysis, where, according to *Byrne*, 979 F.2d at 565, we look at whether the particular impairment constitutes a significant barrier for the particular person. What impairment will significantly impede learning for a person obtaining her third doctorate is not the same as one which would affect the average tenth grader's ability to learn. But any narrowing of what constitutes learning for a particular individual occurs within reasonable limits—coverage of the Rehabilitation Act is not open-ended or based on every dream or desire that a person may have. Not every impairment that affects an individual's major life activities is a substantially limiting impairment. The key obviously is the extent to which the impairment restricts the major life activity. *Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1454 (7th Cir. 1995). For that individual, "[t]he impairment must limit [learning] generally." *Byrne*, 979 F.2d at 565. Just as "[i]t is well established that an inability to perform a particular job for a particular employer is not sufficient to establish a handicap [in regard to working]," the inability to engage in a particular activity for a particular university is not sufficient to establish a disability in regard to education. *Id.*; *see Heilweil v. Mt. Sinai Hosp.*, 32 F.3d 718 (2d Cir. 1994) (no disability because asthmatic condition did not substantially limit breathing or working except while in one room of building), *cert. denied*, 115 S. Ct. 1095 (1995); *Welsh*, 977 F.2d at 1419 (sincere desire to become a firefighter does not mean inability to become one due to sensory deprivation in fingers substantially limits ability to work); *Daley v. Koch*, 892 F.2d 212, 215 (2d Cir. 1989) (being declared unsuitable for particular position of police officer not substantial limita-

tion of major life activity). An impairment that interferes with an individual's ability to perform a particular function, but does not significantly decrease that individual's ability to obtain a satisfactory education otherwise, does not *substantially* limit the major life activity of learning. *Welsh*, 977 F.2d at 1418.

Because learning through playing intercollegiate basketball is only one part of the education available to Knapp at Northwestern, even under a subjective standard, Knapp's ability to learn is not substantially limited. Knapp's scholarship continues, allowing him access to all academic and—except for intercollegiate basketball—all nonacademic services and activities available to other Northwestern students, in addition to all other services available to scholarship athletes. Although perhaps not as great a learning experience as actually playing, it is even possible that Knapp may "learn" through the basketball team in a role other than as a player.[5] Knapp is an intelligent student and athlete, and the inability to play intercollegiate basketball at Northwestern[6] forecloses only a small portion of

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[5] Although the present situation appears not to be an ideal learning setting, it is *possible* that in the future Knapp may be allowed more of a role where he will gain knowledge and experience through his participation with the team other than as a player. In the face of Knapp's affidavit, though, we find somewhat disingenuous Northwestern's assertion that Knapp currently is given an opportunity to participate in the basketball program. Knapp indicates that he must attend each practice and game, but he just sits on the bench doing nothing. At practices he is not allowed to do anything but watch. If these facts are true, and Northwestern has not argued that they are not, Knapp is not currently being afforded much of an opportunity for true participation—even nonplaying "participation"—on the team.

[6] Some may wonder why Knapp, if he wants to play basketball so badly, does not just transfer to another school where he is guaranteed the opportunity to play for a team. That thought assumes all colleges and universities are interchangeable, which we decline to believe is true. Outside of basketball, Knapp may very well feel that Northwestern provides for him the best setting

(Footnote continued on following page)

his collegiate opportunities. Like the firefighter in *Welsh*, who did not show that his education and training limited him to being a firefighter, *Welsh*, 977 F.2d at 1419, Knapp has not shown that his education and training limit him to do nothing but play basketball. The fact that Knapp's goal of playing intercollegiate basketball is frustrated does not substantially limit his education. The Rehabilitation Act does not guarantee an individual the exact educational experience that he may desire, just a fair one. Consequently, we hold that Knapp as a matter of law is not disabled within the meaning of the Rehabilitation Act.

Even if we were inclined to find Knapp disabled under the Rehabilitation Act, he would still come up short because we also hold as a matter of law that he is not, under the statute, "otherwise qualified" to play intercollegiate basketball at Northwestern. A qualified disabled person, with respect to postsecondary education services, is a "person who meets the academic and technical standards requisite to admission or participation in the [school's] education program or activity." 34 C.F.R. § 104.3(k)(3); 45 C.F.R. § 84.3(k)(3). An explanatory note to the regulations states that the term "technical standards" means "all nonacademic admissions criteria that are essential to participation in the program in question." 34 C.F.R. pt. 104, app. A, subpt. A(5); 45 C.F.R. pt. 84, app. A, subpt. A(5).

Section 794 does not compel educational institutions to disregard the disabilities of disabled persons. *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979). It requires only that an "otherwise qualified" disabled person not be excluded from participation in a federally

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[6] *continued*
academically, socially, geographically, and otherwise. Nevertheless, Knapp has offered no evidence that there are no other schools to which he could transfer where he would be allowed to play. Northwestern is not the only place where Knapp may obtain an education, which confirms that denial of the right to play basketball *at Northwestern* is not a denial of his general ability to learn at the college level.

funded program solely because of the disability. *Id.* In other words, although a disability is not a permissible ground for assuming an inability to function in a particular context, the disability is not thrown out when considering if the person is qualified for the position sought. *Id.* at 405-6. "An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap," *id.* at 406, with reasonable accommodation, *see Arline*, 480 U.S. 287-88 n.17 ("when a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any reasonable accommodation by the employer would enable the handicapped person to perform those functions").

Legitimate physical qualifications may in fact be essential to participation in particular programs. *Southeastern*, 442 U.S. at 407.

> Paragraph (k) of § 84.3 defines the term "qualified handicapped[7] person." Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

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[7] The Rehabilitation Act was amended in 1992 to replace the term "handicap" with the word "disability." Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4360. The regulations have not caught up.

45 C.F.R. pt. 84, app. A, subpt. A(5); 34 C.F.R. pt. 104, app. A, subpt. A(5). Although blanket exclusions are generally unacceptable, legitimate physical requirements are proper. *See Southeastern*, 442 U.S. at 407; *Davis v. Meese*, 692 F. Supp. 505, 517 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3d Cir. 1989).

A significant risk of personal physical injury can disqualify a person from a position if the risk cannot be eliminated. *Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991). But more than merely an elevated risk of injury is required before disqualification is appropriate. *Mantolete v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985). Any physical qualification based on risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented, since almost all disabled individuals are at a greater risk of injury. *Bentivegna v. United States Dept. of Labor*, 694 F.2d 619, 622 (9th Cir. 1982).

In *Mantolete*, the Ninth Circuit addressed the standard to apply in determining if an individual is otherwise physically qualified to perform an activity when the possibility of future injury exists:

> [I]n some cases, a job requirement that screens out qualified handicapped individuals on the basis of possible future injury is necessary. However, we hold that in order to exclude such individuals, there must be a showing of a reasonable probability of substantial harm. Such a determination cannot be based merely on an employer's subjective evaluation or, except in cases of a most apparent nature, merely on medical reports. The question is whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm.
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> . . . .
>
> In applying this standard, an employer must gather all relevant information regarding the applicant's work history and medical history, and independently

> assess both the probability and severity of potential injury. This involves, of course, a case-by-case analysis of the applicant and the particular job.

767 F.2d at 1422; *see Chiari*, 920 F.2d at 317 (disabled person not qualified for job if there is genuine substantial risk that worker could be injured or could injure others and employer cannot modify job to eliminate risk). We agree this is the appropriate standard. We now turn, however, to who should make such an assessment.

In this case, the severity of the potential injury is as high as it could be—death. In regard to the probability of injury, Dr. John H. McAnulty, one of Knapp's experts, testified at the injunction hearing that the annual risk of death to Knapp as a result of his cardiac condition under a worst-case scenario is 2.4 percent and that playing intercollegiate basketball would elevate this annual risk to 2.93 percent, or 1 in 34. In other words, if 34 Nick Knapps played basketball for a year, chances are one would die. Dr. Brian Olshansky, another expert for Knapp, put Knapp's risk of death for the 1996-97 basketball season at no greater than 1 in 100. These estimates took into account Knapp's internal defibrillator, apparently the only "accommodation" possible for Knapp's condition. Although the doctors indicated that these numbers were merely estimates, all agreed that the risk to Knapp is higher than to the average male collegiate basketball player. Knapp's experts believed it was an acceptable level of risk.

Northwestern's experts agreed with the school's team doctors that Knapp's participation in competitive Big Ten basketball presented an unacceptable level of risk. According to Dr. Barry J. Maron, one of Northwestern's experts, based on a 10-year study, the risk of nontraumatic death for the average male college basketball player is 1 in 28,818. Dr. Maron further testified that participation in intercollegiate basketball significantly increases Knapp's risk of death, although he believed the precise risk could not be quantified. Dr. Douglas J. Zipes agreed. According to both Drs. Zipes and Maron, the most important fact in assessing Knapp's current risk of sudden cardiac death

while playing intercollegiate basketball is the fact that his previous sudden cardiac death was induced by playing basketball.

Knapp's and Northwestern's experts disagreed on the effect of the passage of time on the likelihood that Knapp would suffer another sudden cardiac death. Almost all experts agreed that the internal defibrillator had never been tested under conditions like an intercollegiate basketball game or practice and that it was unclear whether the device would actual work under the stress and physical conditions of a high-intensity sport. Dr. Olshansky, though, indicated that biweekly "interrogations" of the defibrillator would minimize the risk of its failure. Knapp has had his defibrillator checked on a regular basis and has had no problems with it.

The district court judge in this case believed that in the face of conflicting opinion evidence regarding risk, and the fact that no scientific data existed to quantify that risk, the decision on whether Knapp should play falls in the lap of the court:

> We have nothing more exotic here than highly qualified experts, in agreement on all the basic scientific principles and differing only in their medical judgment on the final question. . . . All possess the education, training and experience required to become experts and none disputes the expertise of the others. The range of disagreement is extremely narrow, confined only to the dimensions of the risk of recurrence and the effect of the passage of time on that risk. . . . [M]y task is to consider all the opinions and determine which are most persuasive. It is what the trial of disputes such as this will sometimes require. It might have been better to have left the choice to a panel of physicians, but Congress left it with the courts and the random assignment of this case has left it here with me.
>
> . . . I again find the opinions of Drs. McAnulty, Rink and Olshansky to be persuasive and I find that

the risk to Nicholas Knapp of a repeat episode is not substantial.

We disagree with the district court's legal determination that such decisions are to be made by the courts and believe instead that medical determinations of this sort are best left to team doctors and universities as long as they are made with reason and rationality and with full regard to possible and reasonable accommodations. In cases such as ours, where Northwestern has examined both Knapp and his medical records, has considered his medical history and the relation between his prior sudden cardiac death and the possibility of future occurrences, has considered the severity of the potential injury, and has rationally and reasonably reviewed consensus medical opinions or recommendations in the pertinent field—regardless whether conflicting medical opinions exist—the university has the right to determine that an individual is not otherwise medically qualified to play without violating the Rehabilitation Act. The place of the court in such cases is to make sure that the decision-maker has reasonably considered and relied upon sufficient evidence specific to the individual and the potential injury, not to determine on its own which evidence it believes is more persuasive.

Other courts have held the same. In *Pahulu*, for instance, an intercollegiate football player presented testimony of three specialists in an attempt to show that his risk of permanent neurological injury was no greater than any other player's and that the University of Kansas declared him physically ineligible based on misconceptions. The Kansas district court nevertheless found that "the conclusion of the KU physicians, although conservative, is reasonable and rational . . . and is supported by substantial competent evidence for which the court is unwilling to substitute its judgment." *Pahulu*, 897 F. Supp. at 1394. We reject those cases intimating that a school's rational decision has no weight. *See Poole v. South Plainfield Bd. of Educ.*, 490 F. Supp. 948, 954 (D.N.J. 1980) (school board incorrectly "insisted nonetheless in imposing

its own rational decision over the rational decision of the Pooles").

In *Arline*, where a school teacher with tuberculosis was fired and thereafter sued her employer under the Rehabilitation Act, the Supreme Court stated that an "otherwise qualified" inquiry must be individualized and

> should include
>
> > ". . . facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk . . . , (b) the duration of the risk . . . , [and] (c) the severity of the risk . . . ."
>
> In making these findings, the courts normally should defer to the reasonable medical judgments of public health officials.

Arline, 480 U.S. at 287-88. The Court, however, refrained from addressing the deferential weight of the medical judgments of private physicians on which the employer relied. *Id.* Although the Bethesda Conferences were not convened by public health officials and such guidelines should not substitute for individualized assessment of an athlete's particular physical condition, the consensus recommendations of several physicians in a certain field do carry weight and support the Northwestern team doctors' individualized assessment of Knapp.

We do not believe that, in cases where medical experts disagree in their assessment of the extent of a real risk of serious harm or death, Congress intended that the courts—neutral arbiters but generally less skilled in medicine than the experts involved—should make the final medical decision. Instead, in the midst of conflicting expert testimony regarding the degree of serious risk of harm or death, the court's place is to ensure that the exclusion or disqualification of an individual was individualized, reasonably made, and based upon competent medical evidence. So long as these factors exist, it will be the rare case regarding participation in athletics where a court may

substitute its judgment for that of the school's team physicians.

In this case, the district court found that if

> as a matter of law and fact, all that is required, as *Pahulu* [cite omitted] holds, is that Northwestern make a rational decision that Knapp's risk is substantial based on reasonable evidence to which courts must defer, then I find Northwestern has done this.

Because we hold today as a matter of law that a court must allow Northwestern to make its own determinations of substantial risk and severity of injury if they are based on reliable evidence, the district court's order forcing Northwestern to let Knapp play must be reversed.

We note further that the district court did not distinguish between the reasonableness of Northwestern's decision to exclude Knapp back in the 1995-96 season and the reasonableness of its decision to bar him from playing this year and the next two. Knapp contends that no proper finding of reasonableness appears in the record because the district court stated that the issue to be addressed was Knapp's condition this fall rather than the rectitude or irrectitude of Northwestern's actions. Dr. Sweeney's and Dr. Gardner's bases for deeming Knapp ineligible in 1995-96 do appear in the record, however, and both testified regarding the present season that, based upon their prior information and the newer testimony of Drs. Rink, Olshansky, McAnulty, Maron, and Zipes, they still believed Knapp remains at a substantial risk of death by playing intercollegiate basketball.

In closing, we wish to make clear that we are *not* saying Northwestern's decision necessarily is the right decision. We say only that it is not an illegal one under the Rehabilitation Act. On the same facts, another team physician at another university, reviewing the same medical history, physical evaluation, and medical recommendations, might reasonably decide that Knapp met the physical qualifications for playing on an intercollegiate basketball team. Simply put, all universities need not evaluate risk the

same way. What we say in this case is that if substantial evidence supports the decision-maker—here Northwestern—that decision must be respected.

Section 794 prohibits authorities from deciding without significant medical support that certain activities are too risky for a disabled person. Decisions of this sort cannot rest on paternalistic concerns. Knapp, who is an adult, is not in need of paternalistic decisions regarding his health, and his parents—more entitled to be paternalistic toward him than Northwestern—approve of his decision. *See Wright* at 794 (Columbia's decision not to allow student with sight in only one eye to play football "contrary to the express wishes of his parents who, together with their son, have reached a rational decision concerning the risk involved"). In regard to cases involving risk of future injury, a school's perception of the threat of such injury cannot be based on unfounded fears or stereotypes; it must be based on objective evidence. *Chiari*, 920 F.2d at 317. But here, where Northwestern acted rationally and reasonably rather than paternalistically, no Rehabilitation Act violation has occurred. The Rehabilitation Act "is carefully structured to replace . . . reflexive actions to actual or perceived handicaps with actions based on reasoned and medically sound judgments . . . ." *Arline*, 480 U.S. at 284-85.

For these reasons, the district court's grant of the permanent injunction and denial of Northwestern's motion for summary judgment are reversed and the case is remanded with instructions to enter summary judgment in favor of Northwestern.

REVERSED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: November 22, 1996

BEFORE: Honorable William J. Bauer, Circuit Judge
Honorable Diane P. Wood, Circuit Judge
Honorable Terence T. Evans, Circuit Judge

No. 96-3450

NICHOLAS KNAPP,

Plaintiff - Appellee

v.

NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICHARD TAYLOR,

Defendants - Appellants

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 95 C 6454, James B. Zagel, Judge

The judgment of the District Court is REVERSED, with costs, and the case is REMANDED, in accordance with the decision of this court entered on this date.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 3, 1997

Before

Hon. William J. Bauer, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*
Hon. Terence T. Evans, *Circuit Judge*

NICHOLAS KNAPP,

Plaintiff-Appellee,

No. 96-3450 v.

NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICK TAYLOR,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 95 C 6454—**James B. Zagel**, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause on December 6, 1996, by the plaintiff-appellee, no judge in active service has requested a vote

thereon,[1] and all of the judges on the original panel have voted to deny a rehearing.

Accordingly, IT IS ORDERED that the petition for rehearing and suggestion for rehearing *en banc* be, and the same is hereby DENIED.

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[1] The Honorable Joel M. Flaum, Circuit Judge, and the Honorable Ilana Diamond Rovner, Circuit Judge, did not participate in the consideration of this petition for rehearing.

APPENDIX C

938 F.Supp. 508

Nicholas KNAPP, Plaintiff,
v.
NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and Rick Taylor, Defendants.

No. 95 C 6454.

United States District Court,
N.D. Illinois,
Eastern Division.

Sept. 13, 1996.

MEMORANDUM OPINION AND ORDER

ZAGEL, District Judge.

On September 19, 1994, Knapp's heart stopped and he collapsed following a pick-up basketball game in his high school gym. Knapp was revived by paramedics using cardiopulmonary resuscitation and electronic defibrillation. Knapp was then hospitalized and diagnosed as having suffered sudden cardiac death caused by primary ventricular fibrillation. Knapp claims he suffered a ventricular fibrillation following an episode of syncope. On October 3, 1994, Knapp had an automatic cardioverter defibrillator implanted in his abdomen to attempt to restart his heart in the event of another cardiac arrest. The defibrillator's purpose is to recognize certain heart arrhythmias and provide programmed therapy to restore any such heart arrhythmias to normal.

On November 9, 1994, Knapp signed a National Letter of Intent to attend Northwestern on an athletic scholarship to play basketball. Northwestern was aware of Knapp's heart condition at the time of the signing. When Knapp began Northwestern in the fall of 1995, Dr. Howard Sweeney, the head physician for Northwestern's Basketball team, concluded that Knapp was not medically eligible to participate in intercollegiate basketball based upon Knapp's medical records, published medical guidelines, and recommendations of other physicians he consulted. Knapp continues to be a member of the team and continues to receive his scholarship, but he is not able to practice or compete with the team. Knapp wishes to play basketball for Northwestern and sues under the Rehabilitation Act.

At a hearing in this Court on September 6, 1996, four cardiologists testified as to Knapp's condition and his risk of future injury. They were evenly split on their conclusions as to whether he might play, but they were largely in agreement on the substance of the medical science applicable to Nicholas Knapp and his heart.

Rehabilitation Act

Section 504(a) of the Rehabilitation Act of 1973 protects "otherwise qualified individuals" from discrimination on account of disability. The purpose of the Act is to provide an "even handed treatment of qualified handicapped persons" and to prevent discrimination based on a perceived "inability to function in a particular context." In order to make out a prima facie case of discrimination under the Rehabilitation Act, Knapp must demonstrate that (1) he is a "disabled" individual within the meaning

of the Act, (2) he is "otherwise qualified" for the position sought, (3) he is excluded from the position solely because of the disability, and (4) the position from which he is excluded is part of a federally funded program.

In deciding a case under the Rehabilitation Act the rational basis test is not applicable. The statute by its very terms does not provide that a recipient of federal financial assistance may discriminate against an individual on the basis of a handicap, even if there is a rational basis for so discriminating. The inquiry is whether the University has, in fact, discriminated on the basis of handicap.

Northwestern admits that it receives federal financial assistance and that it has disqualified Knapp from playing solely because of his cardiovascular impairment. Thus, the only remaining issues are whether Knapp is "disabled" within the meaning of the statute and whether he is "otherwise qualified" to play intercollegiate basketball.

(1) The Rehabilitation Act defines a "disabled" individual as a person who has a physical impairment that substantially limits ***510** one or more of his major life activities. Whether a person is "disabled" within the meaning of the Act is a highly fact-sensitive question. There is no question that Northwestern regards Knapp as having a permanent cardiovascular impairment constituting a physical impairment under the Act. However, Northwestern argues that intercollegiate basketball is not a "substantial life activity" and that Knapp has not been "substantially limited" in participating in the sport.

(a) The district courts, and these are the only courts that have addressed the issues, are split over whether participation in sports is a "major life activity." See Pahulu v. University of Kansas, 897 F.Supp. 1387 (D.Kan.1995). The federal regulations define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." What constitutes a major life activity must be determined on an individual basis, so a plaintiff need only prove that a particular function is a major life activity as to him.

Intercollegiate sports play a major role in a student's education and learning process. This has been recognized by several courts that have found physical education and participation in athletic activities on college campuses to be an important part of the educational process. The regulations promulgated pursuant to the Rehabilitation Act support this viewpoint by prohibiting universities from discriminating against qualified disabled athletes who are to have an equal opportunity for participation in intercollegiate athletics. The regulations specifically state that "[i]n providing . . . athletics . . . to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers . . . intercollegiate . . . athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities." 34 C.F.R. § 104.47.

While the issue is not free from doubt, I find that intercollegiate sports competition may constitute a major life activity. I find, without doubt, that it is for Nicholas Knapp. It is clear that competitive basketball has played a substantial role in Knapp's education and learning process as he has learned valuable life skills and charac-

ter traits. As Knapp stated in his affidavit, "[m]y participation in competitive basketball has provided me and could continue to provide me with a unique experience that I have not encountered in any other extracurricular activity in which I have been involved or in which I could possibly become involved. Among other things, competitive basketball has helped to instill in me the following character traits: confidence, dedication, leadership, teamwork, discipline, perseverance, patience, the ability to set priorities, the ability to compete, goal-setting and the ability to take coaching, direction and criticism. . . . Competitive basketball has also given me recognition in the community, and provided me with the opportunity to meet new people. . . . Competitive basketball has also supplied me with a meaningful outlet for intense physical exercise and an enjoyment and happiness that cannot be duplicated in an open gym or intramural setting." Because competitive basketball is an important and integral part of Knapp's education and learning experience, I find that intercollegiate basketball is a major life activity for him.

(b) Northwestern argues that exclusion from participation in a single extracurricular activity is not a substantial limitation because he can engage in other activities that would provide him with the same educational benefits such as playing an instrument in the school band or orchestra. I do not disagree that participation in the band or orchestra may give a student who has trained for years on a particular instrument an educational experience similar to that of intercollegiate athletics. However, the law is not satisfied by telling a student who has trained for years to play basketball that the student can now play in the school band or orchestra

instead and receive the same educational experience. It also undermines the purpose of the Rehabilitation Act not to allow a disabled individual to pursue his chosen field perhaps (particularly so when that field is chosen without knowing of the disability). Furthermore, there are relatively few, if any, activities that demand the same level of teamwork, ***511** precision and discipline as an intercollegiate sport to which a person can transfer particular skills.[1] For this reason, it would probably not be enough for Northwestern to say that Knapp would be permitted to play baseball or golf.[2]

Northwestern also argues that because Knapp continues to receive his scholarship, still has a role with the team, and is given access to all the benefits given other team members except the ability to play, he is not "substantially limited." Northwestern misses the mark. It is the activity of practice and competition that constitutes a large part of the learning experience for Knapp. Being able to attend games and travel with the team does not make up for not being able to practice with the team and have a reasonable chance to play in games. It is the playing of basketball that teaches discipline, teamwork, and perseverance. These traits are not developed by being a perpetual observer. The fact that Northwestern

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[1] I might be willing to find that an athlete who plays both intercollegiate football and baseball is not substantially limited if he is disqualified from only football, but that is not the case here.

[2] The Bethesda Conference classified Basketball as having moderate static and high dynamic demands. Baseball as having low static and moderate dynamic demands and golf as having low static and low dynamic demands.

will not allow Knapp to play constitutes a substantial limitation on his ability to play intercollegiate basketball.

(2) Knapp must next prove that he is "otherwise qualified" to play intercollegiate basketball at Northwestern. In other words, Knapp must be able to meet all of the program's requirements in spite of his handicap. The parties agree that an individual is not qualified if there is a genuine substantial risk that he or she could be injured or could injure others. When making this determination, whether the risk of injury is substantial, a court must be careful not to undermine the policy of the Rehabilitation Act by letting remote concerns legitimize discrimination. "Any qualification based on risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at a greater risk [of injury]." Bentivegna v. U.S. Dept. of Labor, 694 F.2d 619, 622 (9th Cir.1982). Thus, this case turns on whether the risk of injury, death, to Knapp of playing intercollegiate basketball is substantial.

I find the risk of injury to Knapp is not substantial based on the testimony of the four cardiologists who testified at the hearing. Dr. McAnulty testified that the risk of death for individuals that have experienced ventricular fibrillation and sudden death goes down after the first year. Doctors Zipes and Maron testified that the risk is not time dependent, but they conceded that most recurrences happen within the first year. It is now nearly two years to the day that Knapp's heart went into ventricular fibrillation. Knapp has not had a repeat episode or displayed any symptoms. In addition, Knapp's latest echo-cardiogram showed no problems as compared

to his previous echo-cardiograms. This is all in light of the fact that Knapp has continued to play basketball on a competitive level for more than the past year in addition to lifting weights, jogging and sprinting. Had this hearing been conducted more than a year ago, I would have found at that time that the risk of injury to Knapp was substantial. However, the passage of time, as testified to by the cardiologists, is a factor. Knapp has been asymptomatic for two years. The cardiologists agree that the chance Knapp will experience a second event while playing intercollegiate basketball in the first place is low and two of them whom I credit agree that this risk has decreased with the passage of more than one year. In addition, the cardiologists agree that the chance the implantable cardioverter defibrillator will not work to restore a normal heart beat in the event Knapp does experience a second event is slight. While some people might find that a 1 in 1,000 or even a 1 in 1,000,000 chance of dying is too much, the Rehabilitation Act requires that remote or minimal risks not be used to legitimize discrimination. While the determinations of risk were admittedly made without a reasonable degree of medical certainty, since very little data exists regarding ventricular fibrillation and implantable cardioverter defibrillator and none *512 exists regarding intercollegiate athletes in such situations, I find the risk to Knapp is not substantial after the passage of two years without any symptoms. In making this decision, I did not consider the testimony of Dr. Rink who testified to his reevaluation of the cause of Knapp's sudden death in September 1994.

I therefore find that Northwestern's reasons for excluding Nicholas Knapp from playing intercollegiate

basketball violate the Rehabilitation Act.[3] This decision does not state an opinion on whether Northwestern can require Knapp or potential survivors to sign a waiver of liability. It may well have a right to insist on waiver, a right arising from other sources of law. Ordinarily, a plaintiff neither increases nor decreases rights under the Rehabilitation Act by signing or refusing a waiver although waivers may be relevant to reasonableness of accommodation. Nor does it decide whether Northwestern may require a current showing on Knapp's fitness to play on grounds other than the suitability of his cardiac condition. I have only concluded that Northwestern's basis for determining Knapp ineligible to play thus far is insufficient.

(3) To complete the analysis I must evaluate the balance of harms and public interest. The harm to Northwestern if Knapp is able to play basketball is substantial but quite contingent. It is the extremely slight risk that Knapp may harm another player if he receives a shock from his implantable defibrillator and the harm that Northwestern would suffer as an institution if a student wearing a Northwestern jersey were to collapse and die on the basketball court. The harm could include not only the general harm to its university reputation but also is its ability to recruit good student athletes. The harm to Knapp if he is unable to play is substantial and certain.

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[3] Hardly a year goes by that there is not at least one instance of the tragic death of a healthy youth as a result of competitive sports activity. Life has risks. Thus purpose of § 504, however, is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them." Poole v. South Plainfield Bd. of Ed., 490 F.Supp. 948, 953-54 (D.N.J.1980).

Playing intercollegiate basketball is a major life activity for him and his inability to play would curtail his ability to live his life fully and end his chances, however speculative, of a professional basketball career. Knapp does not consider the risk of death to himself to constitute a harm as he is willing to assume that risk. I therefore find that the balance of harms weighs in favor of Nicholas Knapp as the injury to him would be irreparable. I find there are arguments for the public interest of equal weight on both sides. The public interest does not preclude issuance of the injunction. Finally, Northwestern must provide Knapp with a reasonable accommodation when he plays. This means here there must be a defibrillator at courtside and a trained person who can operate it at all times when Knapp is practicing and competing in games.

Conclusion

The injunction is granted.

APPENDIX D

[Dated September 25, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICHOLAS KNAPP, Plaintiff,	)	No. 95 C 6454
v.	)	Judge James B. Zagel
NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICHARD TAYLOR, Defendants.	)	

MEMORANDUM OPINION AND ORDER

In seeking to have me reconsider my prior opinion, Northwestern University has presented additional testimony from Dr. Zipes, Dr. McAnulty, Dr. Olshansky and Dr. Gardner. In the course of listening to the testimony, it has become clear that little of the science is in dispute. Dr. Zipes, a distinguished and candid expert, rejects the views of Drs. McAnulty, Olshansky, and Rink, who testified at the first hearing, on the fundamental ground that there is no data to support their conclusions that Nicholas Knapp is at little risk of dying on the basketball court. It is undisputed that there is no data because no one has ever studied, nor has there ever been, an individual who has suffered ventricular fibrillation and sudden death, had an automatic defibrillator implanted

and continued to play competitive basketball at a Division I level. It is also quite clear that such data is likely never to exist as there are relatively few who can play basketball at a Division I level and, at most, a mere handful who have experienced events like Nicholas Knapp. It is also difficult to imagine ever having enough cases to study against a non-playing control group. And even if there were, Dr. Zipes and the physicians at the Bethesda Conference would insist that persons like Knapp do not play, so there never will be data on which to rely in deciding the level of risk. This may not be unusual. I suspect that some medical risks remain forever unknown because it would be unethical to perform the studies which would tell what the risk might be.

Dr. Zipes contends in this case that there is a risk, he does not know how great it is, and no one else can *know now* how great that risk may be. At bottom, I do not think that any expert in this case is in serious disagreement with these contentions. Even the Drs. Olshansky and McAnulty who tried reluctantly to quantify the risk (their reward was that the University made good use of their efforts against them). In fact the risk is clearly unquantifiable. Regrettably unanimous agreement on this gets us nowhere because to decide here, Congress has required a judicial decision on the substantiality of the risk.

Where the law requires a decision as to the probable truth of something when the scientific truth of it is unknowable, the decision must generally (but not always) be made even if it is made without what passes for scientific probability. In such cases, we ordinarily erect presumptions. Dr. Zipes may be doing this. One could take his position to be that since the gravity of the risk can-

not be scientifically known, we must presume the risk to be substantial and hence medically unacceptable. In other words, in the absence of evidence of safety, we must presume danger. Stated this way, the opinions of Dr. Zipes are legal or moral in nature, not scientific. In science what is unproved is unproved. A scientist can not ordinarily make a scientific judgment that, in the absence of proof that the answer is probably yes, then the answer is probably no. The answer is simply, we do not know.

Having said this I do not think that this really is Dr. Zipes' position. Instead, his view is that, based on his well honed medical judgment there are substantial risks in all cases like that of Nicholas Knapp and also in Knapp's case in particular. In addition, the contrary opinion of other physicians must be disregarded because they lack scientific proof and because their medical judgment is wrong.

Another theme of Dr. Zipes' testimony is that it is unnecessary to quantify the risks to Knapp playing basketball, as Drs. McAnulty and Olshansky have done, since any risk above and beyond the risk to Knapp for engaging in ordinary daily life functions is unacceptable. This premise that increased risks exist for Knapp playing basketball is scientifically undisputed here. While this recommendation that an individual should not engage in any "unessential" activity that increases one's risk under these circumstances, no matter how great or small, is clearly rational in the medical profession, it cannot mandate a decision under the law as Congress wrote it.

We have nothing more exotic here than highly qualified experts, in agreement on all the basic scientific

principles and differing only in their medical judgment on the final question. The difference of opinion between medical experts in this case is not unusual. Years ago, physicians who testified in court often said that medicine was an art and not a science. This is much less true today than it was in the 1960s when I first heard it. *See Mercado v. Ahmed*, 756 F. Supp. 1097, 1101 n.7 (N.D. Ill. 1991). Yet there is still truth in the old saw and it applies to questions like those here where physicians have decades of personal professional experience with heart problems of the sort in this case and not a single scientific study squarely on point to back up their judgments. The judgments may differ but are not worthless or inadmissible for this reason. A high degree of inter-expert reliability is not a sine qua non of admissible medical opinion, in the courtroom or in the hospital. Indeed the very utterance that medicine was more art than science was the physician witness' way of explaining to courts how it was that doctors could so strongly disagree. All the physicians who testified used commonly accepted scientific principles and proven data about the heart and its functioning. All possess the education, training and experience required to become experts and none disputes the expertise of the others. The range of disagreement is extremely narrow, confined only to the dimensions of the risk of recurrence and the effect of the passage of time on that risk. I find that there is nothing in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), or Federal Rule of Evidence 702, that precludes me from considering the views of all the physicians in this case. As such, I cannot summarily disregard the opinions of Drs. McAnulty, Olshansky and Rink, nor, for that matter, the opinions of Drs. Zipes, Maron and Gard-

ner as my task is to consider all the opinions and determine which are most persuasive. It is what the trial of disputes such as this will sometimes require. It might have been better to have left the choice to a panel of physicians, but Congress left it with the courts and the random assignment of this case has left it here with me.

We are thus back to where we started. After reconsidering the testimony of the expert witnesses, I again find the opinions of Drs. McAnulty, Rink and Olshansky to be persuasive and I find that the risk to Nicholas Knapp of a repeat episode is not substantial.

We now turn to the issue of reasonable accommodation. I did not focus on this issue in the first opinion. Neither party fully addressed it and in the absence of forceful advocacy I decided that having an external defibrillator at courtside was a reasonable accommodation. Dr. Zipes now testifies that an external defibrillator may actually do great harm in the presence of an internal defibrillator when used outside the environs of a medical office or hospital. Dr. Zipes also noted that, in any event, the degree to which Knapp's risk would be reduced by the presence of an external defibrillator is unknown. I find this testimony persuasive, but all that it implies is that an external defibrillator cannot be required as a reasonable accommodation. Indeed, I think Dr. Olshansky and, to a lesser extent, Dr. McAnulty offered a courtside defibrillator option more as a comfort factor to the Court and perhaps to the University. After considering the credible testimony of the doctors Olshansky and McAnulty, I am persuaded that the reasonable accommodation is the one that has already been made, that is the implantable defibrillator. Thus, the external defibrillator is

not required and thus the issue of its cost and reasonableness is moot.

The issue of accommodation now shifts to how often the internal defibrillator should be interrogated. Dr. Zipes testified that it should be interrogated after every game, while Dr. Olshansky testified out of an abundance of caution that it should be interrogated every two weeks. I accept Dr. Olshansky's opinion here because of Knapp's recent experience of months of physical activity including playing basketball. Thus, the only reasonable accommodation is for Knapp to have his internal defibrillator interrogated bi-weekly. Since the cost of interrogation has been assumed by Knapp, at least for purposes of injunctive relief, I need not consider the reasonableness of cost to Northwestern at this time.

I do find, as a matter of law and fact, that if all the law requires, as *Pahulu v. University of Kansas*, 897 F. Supp. 1387 (D. Kan. 1995) holds, is that Northwestern make a rational decision based on reasonable evidence that Knapp's risk is substantial to which courts must defer, I find Northwestern has done this.

Plaintiff's counsel is ordered to prepare a draft order of injunction for inspection by defense counsel.

Enter:

/s/ James B. Zagel
James B. Zagel
United States District Judge

Date: September 25, 1996

APPENDIX E

[Dated September 26, 1996]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NICHOLAS KNAPP, Plaintiff,	)	No. 95 C 6454
v.	)	Judge James B. Zagel
NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICHARD TAYLOR, Defendants.	)	

ORDER AND JUDGMENT GRANTING PERMANENT INJUNCTION

This matter having come before the court for trial on plaintiff Nicholas Knapp's prayer for permanent injunction pursuant to the Rehabilitation Act of 1973 (29 U.S.C. § 794 et seq.) to:

1. Enjoin and restrain defendants (including any of their officers, agents, employees or attorneys) from excluding plaintiff from participating as an active and eligible member of Northwestern University's men's intercollegiate basketball team ("Northwestern's basketball team") on any basis related to the suitability of plaintiff's cardiac condition or any condition related thereto; and

2. Require defendants to provide to plaintiff immediately all benefits, rights and privileges given to other active and eligible members of Northwestern's men's basketball team.

The issues having been tried, with certain evidence submitted by the parties, and the written arguments of counsel considered, and the Court having issued a Memorandum Opinion and Order dated September 9, 1996 and September 25, 1996 (collectively "Memorandum Opinion"), which are attached hereto as Exhibit A and Exhibit B, respectively, and are incorporated by reference, the Court hereby finds and concludes as follows:

1. The Court has jurisdiction of this cause under the Rehabilitation Act of 1973, 29 U.S.C. § 794 et seq.

2. Pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, the Court hereby incorporates by reference the factual findings and conclusions of law which are set forth in its Memorandum Opinion as the factual findings and conclusions of law in this Judgment Order.

3. Based upon the findings of fact and conclusions of law set forth in the Memorandum Opinion, the Court concludes that plaintiff is entitled to a permanent injunction in this cause.

IT IS ORDERED that judgment be and is hereby entered against defendants Northwestern University and Rick Taylor (who are hereinafter collectively referred to as "Northwestern") and in favor of plaintiff with respect to plaintiff's prayer for permanent injunctive relief on Count I of the First Amended Complaint. Northwestern and Taylor (including their officers, agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of this

Order) are hereby permanently enjoined and restrained as follows:

1. Northwestern is enjoined and restrained from excluding plaintiff from participating as an active and eligible member of Northwestern's basketball team on any basis related to the suitability of his cardiac condition or any condition related thereto, except as stated in Paragraph 3 below, and is further enjoined and restrained from failing to provide to plaintiff immediately all the benefits, rights and privileges given to other students who are eligible members of Northwestern's basketball team;

2. Northwestern is directed to immediately inform the Big Ten Conference of the court's ruling that plaintiff is to be made an active and eligible member of Northwestern's basketball team and, further, to file with the Big Ten Conference the appropriate documentation to make plaintiff a "counter" for tender of financial aid. Plaintiff's right to participate and compete in all practices and contests of Northwestern's basketball team shall not be adversely affected by either the Big Ten's or the National Collegiate Athletic Association's classification of plaintiff as either a "counter" or a "medical non-counter" as those terms may be defined by either the Big Ten or the NCAA (or any other status relating to the suitability of plaintiff's cardiac condition or any condition related thereto.)

3. The Court shall retain jurisdiction to enforce the terms of this Judgment order, including the modification of its terms based upon a subsequent change

in plaintiff's cardiac condition or any condition related thereto.

4. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Court finds that while there remain other claims which have not yet been fully adjudicated, there is no just reason to delay the entry of this Judgment Order and expressly directs that his Judgment Order be entered.

5. The Court reserves jurisdiction with respect to the enforcement of this Judgment Order, and all other pending claims not fully adjudicated.

Enter:

/s/ James B. Zagel
James B. Zagel
United States District Judge

Date: September 26, 1996

APPENDIX F

942 F.Supp. 1191

Nicholas KNAPP, Plaintiff,
v.
NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and Rick Taylor, Defendants.

No. 95 C 6454.

United States District Court,
N.D. Illinois,
Eastern Division.

Oct. 7, 1996.

CONSOLIDATED MEMORANDUM OPINION AND ORDER

ZAGEL, District Judge.

Nicholas Knapp has moved for an injunction that would allow him to play basketball for Northwestern University. Northwestern in turn has moved for summary judgment on Knapp's claim under the Rehabilitation Act. I have already ruled on the merits of these claims in this case in two separate rulings. This is a consolidation of those opinions.

On September 19, 1994, Nicholas Knapp's heart stopped and he collapsed following a pick-up basketball game in his high school gym. Knapp was revived by paramedics using cardiopulmonary resuscitation and electronic defibrillation. Knapp was then hospitalized

and diagnosed as having suffered sudden cardiac death caused by primary ventricular fibrillation. Knapp claims he suffered a ventricular fibrillation following an episode of syncope. On October 3, 1994, Knapp had an automatic cardioverter defibrillator implanted in his abdomen to attempt to restart his heart in the event of another cardiac arrest. The defibrillator's purpose is to recognize certain heart arrhythmias ***1194** and provide programmed therapy to restore any such heart arrhythmias to normal.

On November 9, 1994, Knapp signed a National Letter of Intent to attend Northwestern on an athletic scholarship to play basketball. Northwestern was aware of Knapp's heart condition at the time of the signing. When Knapp began Northwestern in the fall of 1995, Dr. Howard Sweeney, the head physician for Northwestern's basketball team, concluded that Knapp was not medically eligible to participate in intercollegiate basketball based upon Knapp's medical records, published medical guidelines, and recommendations of other physicians he consulted. Knapp continues to be a member of the team and continues to receive his scholarship, but he is not able to practice or compete with the team. Knapp wishes to play basketball for Northwestern and sues under the Rehabilitation Act.

Two hearings were held in this courtroom in which a number of cardiologists testified regarding Knapp's present condition, his risk of future injury and the type of reasonable accommodation necessary. The cardiologists were evenly split on their conclusions as to whether he should play, but they were largely in agreement on the substance of the medical science applicable to Nicholas Knapp and his heart.

Discussion

A party seeking a permanent injunction must establish that (1) he has succeeded on the merits, (2) no adequate remedy at law exists, (3) irreparable harm will arise absent injunctive relief, (4) the balance of harms favors entry of an injunction, and (5) the entry of the injunction will not harm the public interest. Smith Barney, Harris Upham & Co., Inc. v. St. Pierre, 1994 WL 11600, *3 (N.D.Ill.1994).

Rehabilitation Act

Section 504(a) of the Rehabilitation Act of 1973 protects "otherwise qualified individual[s]" from discrimination on account of disability. 29 U.S.C. § 794(a). The purpose of the Act is to provide even-handed treatment of qualified disabled persons and to prevent discrimination based on a perceived inability to function in a particular context. In order to make out a prima facie case of discrimination under the Rehabilitation Act, Knapp must demonstrate that (1) he is a "disabled" individual, (2) he is "otherwise qualified" for the program sought, (3) he is excluded from the program solely because of the disability, and (4) the program from which he is excluded is part of a federally funded program. Byrne v. Board of Educ., School of West Allis-West Milwaukee, 979 F.2d 560, 563 (7th Cir.1992).

In deciding a case under the Rehabilitation Act the rational basis test is not applicable. Pushkin v. Regents of University of Colorado, 658 F.2d 1372, 1383-84 (10th Cir.1981). The statute by its very terms does not provide that a recipient of federal financial assistance may discriminate against an individual on the basis of a

handicap, even if there is a rational basis for so discriminating. Id. at 1384. The inquiry is whether the University has, in fact, discriminated on the basis of handicap. Id.

Northwestern admits that it receives federal financial assistance and that it has disqualified Knapp from playing solely because of his cardiovascular impairment. Thus, the only remaining issues are whether Knapp is "disabled" within the meaning of the statute and whether he is "otherwise qualified" to play intercollegiate basketball.

(1) The Rehabilitation Act defines a "disabled" individual as a person who has a physical impairment that substantially limits one or more of his major life activities. 29 U.S.C. § 706(8)(B). Whether a person is "disabled" within the meaning of the Act should be determined on a case by case basis. Byrne, 979 F.2d at 565. There is no question that Northwestern regards Knapp as having a permanent cardiovascular impairment constituting a physical impairment under the Act. However, Northwestern argues that intercollegiate basketball is not a "substantial life activity" and that Knapp has not been "substantially limited" in participating in the sport.

***1195** (a) The district courts, and these are the only courts that have addressed the issue, are split over whether participation in sports is a "major life activity." See Pahulu v. University of Kansas, 897 F.Supp. 1387, 1390-93 (D.Kan.1995); Doe v. Dolton Elementary School Dist. No. 148, 694 F.Supp. 440, 445 (N.D.Ill.1988); cf Scharff v. Frank, 791 F.Supp. 182, 184 (S.D.Ohio 1991). The federal regulations define "major life activities" as "functions such as caring for one's self, performing man-

ual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 C.F.R. § 84.3(j)(2)(ii). What constitutes a major life activity must be determined on an individual basis, so a plaintiff need only prove that a particular function is a major life activity as to him. Pahulu, 897 F.Supp. at 1392.

Intercollegiate sports play a major role in a student's education and learning process. This has been recognized by several courts that have found physical education and participation in athletic activities on college campuses to be an important part of the educational process. See, e.g., Pahulu, 897 F.Supp. at 1391-92. The regulations promulgated pursuant to the Rehabilitation Act support this viewpoint by prohibiting universities from discriminating against qualified disabled athletes who are to have an equal opportunity for participation in intercollegiate athletics. The regulations specifically state that "[i]n providing . . . athletics . . . to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers . . . intercollegiate . . . athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities." 34 C.F.R. § 104.47(a)(1).

While the issue is not free from doubt, I find that intercollegiate sports competition may constitute a major life activity. I find, without doubt, that it is for Nicholas Knapp. It is clear that competitive basketball has played a substantial role in Knapp's education and learning process as he has learned valuable life skills and character traits. As Knapp stated in his affidavit, "[m]y participation in competitive basketball has provided me and could continue to provide me with a unique experience that I have not encountered in any other extracurricular

activity in which I have been involved or in which I could possibly become involved. Among other things, competitive basketball has helped to instill in me the following character traits: confidence, dedication, leadership, teamwork, discipline, perseverance, patience, the ability to set priorities, the ability to compete, goal-setting and the ability to take coaching, direction and criticism. . . . Competitive basketball has also given me recognition in the community, and provided me with the opportunity to meet new people. . . . Competitive basketball has also supplied me with a meaningful outlet for intense physical exercise and an enjoyment and happiness that cannot be duplicated in an open gym or intramural setting." Because competitive basketball is an important and integral part of Knapp's education and learning experience, I find that intercollegiate basketball is a major life activity for him.

(b) Northwestern argues that exclusion from participation in a single extracurricular activity is not a substantial limitation because he can engage in other activities that would provide him with the same educational benefits such as playing an instrument in the school band or orchestra. I do not disagree that participation in the band or orchestra may give a student who has trained for years on a particular instrument an educational experience similar to that of intercollegiate athletics. However, the law is not satisfied by telling a student who has trained for years to play basketball that the student can now play in the school band or orchestra instead and receive the same educational experience. It also undermines the purpose of the Rehabilitation Act not to allow a disabled individual to pursue his chosen field particularly so when that field is chosen without

knowing of the disability. Furthermore, there are relatively few, if any, activities that demand the same level of teamwork, precision and discipline as an intercollegiate sport to which a person can transfer particular skills.[1] For this reason, it would probably *1196 not be enough for Northwestern to say that Knapp would be permitted to play baseball or golf.[2]

Northwestern also argues that because Knapp continues to receive his scholarship, still has a role with the team, and is given access to all the benefits given other team members except the ability to play, he is not "substantially limited." Northwestern misses the mark. It is the activity of practice and competition that constitutes a large part of the learning experience for Knapp. Being able to attend games and travel with the team does not make up for not being able to practice with the team and have a reasonable chance to play in games. It is the playing of basketball that teaches discipline, teamwork, and perseverance. These traits are not developed by being a perpetual observer. The fact that Northwestern will not allow Knapp to play constitutes a substantial limitation on his ability to play intercollegiate basketball.

(2) Knapp must next prove that he is "otherwise qualified" to play intercollegiate basketball at Northwest-

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[1] I might be willing to find that an athlete who plays both intercollegiate football and baseball is not substantially limited if he is disqualified from only football, but that is not the case here.

[2] The Bethesda Conference classified Basketball as having moderate static and high dynamic demands. Baseball as having low static and moderate dynamic demands and golf as having low static and low dynamic demands.

ern. In other words, Knapp must be able to meet all of the program's requirements in spite of his handicap. The parties agree that an individual is not qualified if there is a genuine substantial risk that he or she could be injured or could injure others. When making this determination, whether the risk of injury is substantial, a court must be careful not to undermine the policy of the Rehabilitation Act by letting remote concerns legitimize discrimination. "Any qualification based on the risk of future injury must be examined with special care if the Rehabilitation Act is not to be circumvented easily, since almost all handicapped persons are at a greater risk [of injury]." Bentivegna v. U.S. Dept. of Labor, 694 F.2d 619, 622 (9th Cir.1982). A mere elevation of risk, without more, is insufficient to find that Knapp is not "otherwise qualified." Mantolete v. Bolger, 767 F.2d 1416, 1422 (9th Cir.1985). Thus, this case turns on whether the risk of injury (death) to Knapp of playing intercollegiate basketball is substantial. This determination turns on two issues, whether Knapp has a substantial risk of having a recurrent event of ventricular fibrillation while playing basketball and in the event Knapp does have a second episode, whether the implantable cardioverter defibrillator will work.

First, I find the risk to Knapp of a repeat episode is not substantial based on the testimony of the cardiologists who testified at the hearing. In the course of listening to the testimony, it has become clear that little of the science is in dispute. Drs. McAnulty and Olshansky attempted to quantify the risk of death for individuals that have experienced ventricular fibrillation and sudden death. They stated that the risk of death goes down after the first year. Drs. Zipes and Maron did not

significantly disagree. They testified that the risk is not time dependent, but they conceded that most recurrences happen within the first year. Despite this testimony, Dr. Zipes made it clear that there is no data to support the conclusions of Drs. McAnulty and Olshansky. And there is no dispute on this matter because no one has ever studied, nor has there ever been, an individual who has suffered ventricular fibrillation and sudden death, had an automatic defibrillator implanted and continued to play competitive basketball at a Division I level. It is thus clear that the risk to Knapp of experiencing a second event is unquantifiable. Regrettably, unanimous agreement on this gets us nowhere because to decide this case, Congress has required a judicial decision on the substantiality of the risk.

Where the law requires a decision as to the probable truth of something when the scientific truth of it is unknowable, the decision must generally (but not always) be made even if it is made without what passes for scientific probability. In such cases, we ordinarily erect presumptions. We could take the position that because some risk exists, although its gravity cannot be scientifically ***1197** known, we must presume the risk to be substantial. In other words, in the absence of evidence of safety, we must presume danger. But such a presumption assumes that an individual should not engage in any "unessential" activity that increases one's risk under the circumstances, no matter how great or small. While this opinion, which I attribute to Dr. Zipes' testimony, is clearly rational in the medical profession, it cannot mandate a decision under the law as Congress wrote it.

In this case, there are highly qualified experts in agreement on all the basic scientific principles and dif-

fering only in their medical judgment on the final question. The difference of opinion between medical experts in this case is not unusual. Years ago physicians who testified in court often said that medicine was an art and not a science. This is much less true today than it was in the 1960s when I first heard it. See Mercado v. Ahmed, 756 F.Supp. 1097, 1101 n. 7 (N.D.Ill.1991). Yet there is still truth in the old saw and it applies to questions like those here where physicians have decades of personal professional experience with heart problems of the sort in this case and not a single scientific study squarely on point to back up their judgments. The judgments may differ but are not worthless or inadmissible for this reason. All the physicians who testified used commonly accepted scientific principles and proven data about the heart and its functioning. All possess the education, training and experience required to become experts and none disputes the expertise of the others. The range of disagreement is extremely narrow, confined only to the dimensions of the risk of recurrence and the effect of the passage of time on that risk. I find that there is nothing in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), or Federal Rule of Evidence 702, that precludes me from considering the views of all the physicians in this case. As such, I must consider the testimony of all the experts who testified and determine which are most persuasive. It is what the trial of disputes such as this will sometimes require. It might have been better to have left the choice to a panel of physicians, but Congress left it with the courts, and the random assignment of this case has left it here with me.

Weighing the testimony of all the experts, the most persuasive factors in reaching my decision are Knapp's lack of symptoms over the past two years and the evidence that the risk of a repeat episode appears to decrease with time, though this is not scientifically proved. It is now nearly two years to the day that Knapp's heart went into ventricular fibrillation. Knapp has not had a repeat episode or displayed any symptoms. In addition, Knapp's latest echo-cardiogram showed no indicia of concern as compared to his previous echo-cardiograms. All this is in light of the fact that Knapp has continued to play basketball on a competitive level for more than the past year in addition to lifting weights, jogging and sprinting. Had this hearing been conducted more than a year ago, I would have found at that time that the risk of injury to Knapp was substantial. The passage of another year matters here. Knapp has been asymptomatic for two years. The cardiologists agree, despite the lack of data, that the chance Knapp will experience a second event while playing intercollegiate basketball in the first place is either low or unknown and two of them, whom I credit, agree that this risk has decreased with the passage of more than one year.

Second, I find the risk that the implantable cardioverter defibrillator will not work to restore a normal heart beat in the event that Knapp does experience another episode is slight. On this the cardiologists seem to agree. While some people might find that a 1 in 1,000 or even a 1 in 1,000,000 chance of dying is too much, the Rehabilitation Act requires that remote or minimal risks not be used to legitimize discrimination. "Hardly a year goes by that there is not at least one instance of the tragic death of a healthy youth as a result of competitive

sports activity. Life has risks. The purpose of s 504, however, is to permit handicapped individuals to live life as fully as they are able, without paternalistic authorities deciding that certain activities are too risky for them." Poole v. South Plainfield Bd. of Ed., 490 F.Supp. 948, 953-54 (D.N.J.1980). I conclude that Northwestern's reasons for excluding ***1198** Nicholas Knapp from playing intercollegiate basketball violate the Rehabilitation Act.

Turning to the issue of reasonable accommodation, the parties debate the efficacy of having an external defibrillator at Knapp's side during practice, games and for a period of time afterwards and the frequency in which the internal cardiac defibrillator ought to be interrogated to insure it is working properly. Northwestern appears to argue, by use of Dr. Zipes' testimony, that there is no accommodation that would be reasonable. Dr. Zipes testified that an external defibrillator may actually do great harm in the presence of an internal defibrillator when used outside the environs of a medical office or hospital. Dr. Zipes noted that, in any event, the degree to which Knapp's risk would be reduced by the presence of an external defibrillator is unknown. On behalf of Nicholas Knapp, Drs. McAnulty and Olshansky testified that having an external defibrillator at courtside during games would reduce the risk of death to Knapp by some small margin. However, considering the testimony of all present regarding the high reliability of the internal defibrillator and the opinions that there is a small increased benefit, or an unknown benefit or a detriment of using an external defibrillator, it appears to me that Knapp has offered the courtside defibrillator option more as a comfort factor to the Court and perhaps to the University than as an accommodation he believes to be neces-

sary. Considering the credible testimony of all the experts, I am persuaded that the reasonable accommodation is the one that has already been made, that is the implantable defibrillator. I find that an external defibrillator cannot be required as a reasonable accommodation and thus the issue of its cost and reasonableness is moot.

The question of accommodation then shifts to how often the internal defibrillator should be interrogated. Dr. Zipes testified that it should be interrogated after every game, while Dr. Olshansky testified, out of an abundance of caution, that it should be interrogated every two weeks. I accept Dr. Olshansky's opinion here because of Knapp's recent experience of months of physical activity including playing basketball. Thus, the only reasonable accommodation is for Knapp to have his internal defibrillator interrogated bi-weekly. Since the cost of interrogation has been assumed by Knapp, at least for purposes of injunctive relief, I need not now consider the reasonableness of cost to Northwestern.

In closing I note that if, as a matter of law and fact, all that is required, as Pahulu v. University of Kansas, 897 F.Supp. 1387, 1394 (D.Kan.1995) holds, is that Northwestern make a rational decision that Knapp's risk is substantial based on reasonable evidence to which courts must defer, then I find Northwestern has done this.

This decision does not state an opinion on whether Northwestern can require Knapp or potential survivors to sign a waiver of liability. It may well have a right to insist on waiver, a right arising from other sources of law. Ordinarily, a plaintiff neither increases nor decreases rights under the Rehabilitation Act by signing or refusing a waiver although waivers may be relevant to

reasonableness of accommodation. Nor does this opinion decide whether Northwestern may require a current showing on Knapp's fitness to play on grounds other than the suitability of his cardiac condition. I have only concluded that Northwestern's basis for determining Knapp ineligible to play thus far is insufficient and in violation of the Rehabilitation Act.

Having found that Knapp has succeeded on the merits, I turn to the remaining elements of the injunction analysis. It is clear that there is no adequate remedy at law for Knapp in this case. Damages for his injury cannot restore what he has lost, the inability to play with his team and compete. The only remedy for his injury is to insure that Northwestern does not continue to exclude him from playing on the Men's Division I Basketball Team. It is also clear that Knapp will suffer irreparable harm if injunctive relief is not granted since he will lose his chance of ever playing Division I basketball.

Next, I balance the harms. If Knapp is able to play basketball the harm to *1199 Northwestern would be substantial, but quite contingent. It is the extremely slight risk that Knapp may harm another player if he receives a shock from his implantable defibrillator and the harm that Northwestern would suffer as an institution if a student wearing a Northwestern jersey were to collapse and die on the basketball court. The harm could include not only the general harm to its university reputation but also to its ability to recruit good student athletes. The harm to Knapp if he is unable to play is substantial and certain. Playing intercollegiate basketball is a major life activity for him and his inability to play would curtail his ability to live his life fully and end his chances, however speculative, of a professional

basketball career. Knapp does not consider the risk of death to himself to constitute a harm as he is willing to assume that risk. I therefore find that the balance of harms weighs in favor of Nicholas Knapp.

Finally, I find there are arguments for the public interest of equal weight on both sides. Thus, the public interest does not preclude issuance of the injunction.

Conclusion

The permanent injunction is granted. The motion for summary judgment is also denied.

Supreme Court, U.S.
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No. 96-1622

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

NICHOLAS KNAPP,
Petitioner,
v.
NORTHWESTERN UNIVERSITY,
an Illinois not-for-profit corporation,
and RICK TAYLOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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QUESTIONS PRESENTED

1. Whether the court of appeals properly held that it was appropriate under the Rehabilitation Act of 1973 to defer to the decision of Northwestern University's team physician, supported by the consensus recommendation of a group of nationally respected cardiologists, that a student with petitioner's medical condition should not participate in intercollegiate basketball.

2. Whether petitioner is "substantially limited" in a "major life activity" by not being permitted to play intercollegiate basketball at Northwestern because of his heart condition, even though his scholarship continues and he continues to receive access to the academic and non-academic services offered by the University.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

1. Petitioner Nicholas Knapp is a student who attended Peoria Woodruff High School in Illinois and now attends Northwestern University. Northwestern is a private educational institution with its main campus in Evanston, Illinois. Northwestern is a member of the National Collegiate Athletic Association, the Big Ten Athletic Conference and competes at the Division I level in intercollegiate sports, including men's basketball.

Based on his performance in high school, petitioner is precisely the type of scholar athlete that Northwestern recruits to play on its basketball team. He is academically gifted and was one of the best high school players in

Illinois as a junior. In the summer before petitioner's senior year of high school, Northwestern orally offered him a full athletic scholarship, which he orally accepted.[1] Tragically, during the first few weeks of his senior year, petitioner "suffered sudden cardiac death—meaning his heart stopped—during a pick-up basketball game." Pet. App. A-2.

Fortunately, paramedics were able to revive petitioner through cardiopulmonary resuscitation, defibrillation and drug injections. Petitioner was hospitalized and later physicians implanted a cardioverter-defibrillator in petitioner's abdomen. This is a device that will attempt to restart petitioner's heart if it goes into ventricular fibrillation. *Id.*

True to its word, Northwestern reaffirmed its commitment to provide petitioner with a full scholarship, regardless of his ultimate medical condition. Accordingly, in the fall of his senior year, petitioner signed a national letter of intent to attend Northwestern. Because of his heart condition, petitioner did not play basketball during his final year in high school. He did graduate valedictorian of his high school class in the spring of 1995 and he enrolled that fall at Northwestern. *Id.* at A-2 to A-3.

2. The determination of an athlete's medical eligibility to participate in an intercollegiate athletic program is not made by athletic directors or coaches. The risk is too great that they may downplay the importance of medical problems in favor of having a talented player available to participate. For that reason, Northwestern's Presidential

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[1] Under the rules of the National Collegiate Athletic Association, a member institution is not permitted formally to accept a signed national letter of intent from a student to attend a particular university until the fall of the student's senior year in high school. It is, however, permissible and common for major universities to obtain oral commitments from student athletes prior to the formal signing date.

Directive on Self-Regulation of Intercollegiate Athletics, the Big Ten Conference's Handbook Agreements for Men's Programs, and the NCAA's Constitution and Sports Medicine Handbook all place the sole responsibility to decide whether a student athlete is medically eligible to compete in the judgment of the team physician. Pet. App. A-3 n.1.

Northwestern's head team physician declared petitioner ineligible to compete on Northwestern's basketball team for the 1995-1996 season. This judgment was based:

> on [petitioner's] medical records in which several treating physicians recommended that [petitioner] not play competitive basketball, the report of team physician Dr. Mark Gardner following a physical examination of [petitioner], published guidelines and recommendations following two national medical conferences known as the Bethesda Conferences regarding eligibility of athletes with cardiovascular abnormalities, and recommendations of physicians with whom Dr. Gardner and Dr. Sweeney consulted.

Id. at A-3 to A-4 (footnote omitted).

Under ordinary circumstances, a defibrillator should effectively protect the health of an individual with petitioner's condition. The problem is that, if petitioner plays intercollegiate basketball, he unquestionably faces an increased risk of his heart stopping (*i.e.*, death) because of his medical problems. *Id.* at A-5. In addition, no one can confidently predict how the defibrillator will perform in the unusually stressful conditions created by participating in intercollegiate basketball. Thus, there exists a significant, but unquantifiable, risk that, if petitioner's heart were to stop while he was playing, the defibrillator might not restart the heart. R. 107-3 at p. 149.

Although ineligible to compete on the team, petitioner retained his scholarship and was invited to attend all basketball practices and to sit on the bench with the team at all games. Moreover, he had access to all other aca-

demic and nonacademic programs specially designed for athletes and has remained eligible for other academic and nonacademic offerings the University provides to its students. Pet. App. at A-4.

3. Petitioner filed this lawsuit in the United States District Court for the Northern District of Illinois, alleging that the University's decision to exclude him from intercollegiate basketball at Northwestern violated § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. He sought injunctive relief and compensatory damages.

The district court, after a hearing on petitioner's eligibility to play basketball for Northwestern, granted petitioner injunctive relief. The court first determined that petitioner's heart condition is a "physical impairment" within the meaning of the Act and then considered whether it "substantially limits one or more of his major life activities," which is necessary to be considered disabled within the meaning of § 504.

Finding the issue "not free from doubt" (Pet. App. C-4), the court concluded that playing intercollegiate basketball is a "major life activity" to petitioner. *Id.* Moreover, according to the district court, forbidding petitioner from competing at the intercollegiate level does substantially limit petitioner's ability to participate in his education. *Id.* at C-4 to C-5.

With respect to whether petitioner is "otherwise qualified" to play intercollegiate basketball, the district court gave no consideration to the process by which Northwestern reached its conclusion. Instead, the court concluded that the question is "whether the risk of injury, death, to [petitioner] of playing intercollegiate basketball is substantial." *Id.* at C-7. Moreover, the court reasoned that it was free to decide this question *de novo*. Indeed, for petitioner to prevail, the district court was required to decide the issue that way because the court expressly found that "Northwestern . . . ma[d]e a rational deci-

sion based on reasonable evidence that [petitioner's] risk is substantial. . . ." *Id.* at D-6. Thus, weighing the expert testimony for itself, the district court concluded that petitioner's risk of death "is not substantial" and therefore the University's decision violated § 504. *Id.* at C-8.

4. The court of appeals unanimously reversed. Pet. App. A-1 to A-22. The court first recognized that this case "does not fit neatly under the Rehabilitation Act." *Id.* at A-8. Nevertheless, turning first to the question of petitioner's "disability," the court noted that the parties framed the issue in terms of whether intercollegiate sports is a "major life activity" within the meaning of the Rehabilitation Act. 29 U.S.C. § 706(8)(B). The court of appeals observed that petitioner "is an intelligent student and athlete, and the inability to play intercollegiate basketball at Northwestern forecloses only a small portion of his collegiate opportunities." Pet. App. A-13 to A-14 (footnote omitted). Holding that "[t]he Rehabilitation Act does not guarantee an individual the exact educational experience that he may desire, just a fair one," the court of appeals concluded that petitioner was not "disabled" as a matter of law. *Id.* at A-14.

Alternatively, the court of appeals held that petitioner is not "otherwise qualified" to play intercollegiate basketball at Northwestern. Applying this Court's analysis in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), the court of appeals held that "medical determinations of this sort are best left to team doctors and universities as long as they are made with reason and rationality and with full regard to possible and reasonable accommodations." Pet. App. A-19. Because the University's decision was the product of "reasoned and medically sound judgments," the court of appeals concluded that petitioner was not qualified to play basketball at Northwestern. *Id.* at A-22 (quoting *Arline*, 480 U.S. at 284-85).

REASONS FOR DENYING THE PETITION

This is a novel and hopefully unique case. As the district court candidly acknowledged, "nor has there ever been an individual who has suffered ventricular fibrillation and sudden death, had an automatic defibrillator implanted and continued to play competitive basketball at a Division I level." Pet. App. D-1 to D-2. Given this extraordinarily rare situation, which the court of appeals rightly concluded does not fit neatly into the Rehabilitation Act framework in any event, this case is an inherently unsuitable vehicle for attempting to provide general guidance concerning the meaning of § 504 of the Rehabilitation Act of 1973.

Given the nonrecurring nature of the precise issue actually presented in this case, petitioner, not surprisingly, proposes as the primary question presented whether the court of appeals improperly deferred to the University's decision not to permit petitioner to compete on the varsity basketball team. But even this putatively broader question cannot be divorced from the peculiar circumstances of this case. The team physician's role in this case is relatively unique and the decision to defer to his judgment, supported as it is by both expert testimony and the consensus recommendations of a national medical conference that has reviewed the issue twice in recent years, hardly poses a typical question concerning the proper role of the judiciary in cases arising under the Rehabilitation Act.

Finally, petitioner challenges the alternative holding below that his disability does not impair a major life activity because intercollegiate basketball, by itself, is not such an activity. Even petitioner does not assert that the decision below conflicts with any decision of either this Court or any other court of appeals. Because this alternative ground for decision plainly does not warrant review by this Court, the petition should be denied.

1. The unique circumstances giving rise to this case undermine any realistic likelihood that the precise problem posed here will recur "frequently." Indeed, it is likely that such a case will never arise again. Accordingly, petitioner is forced to present his question as involving a broader issue concerning the proper role of the courts in reviewing whether an individual is "otherwise qualified" within the meaning of § 504 of the Rehabilitation Act. The court of appeals' decision that petitioner was not qualified to play intercollegiate basketball was both correct and not in conflict with any prior decision of this Court or any court of appeals.

A. This Court in *Arline* identified the "basic purpose of § 504" as "to ensure that handicapped individuals are not denied . . . benefits because of the prejudiced attitudes or the ignorance of others." 480 U.S. at 284. Guided by that purpose, the Court did not authorize a freewheeling judicial inquiry into "otherwise qualified" that was divorced from the actual decisionmaking process of the recipient of federal funds. Instead, adopting the inquiry proposed by the American Medical Association as *amicus,* the Court directed lower courts to analyze the issue based on "reasonable medical judgments." *Id.* at 288. In this regard the Court instructed lower courts to consider (1) "the nature of the risk," (2) "the duration of the risk," (3) "the severity of the risk," and (4) "the probabilities" that various risks will occur. *Id.* The focus of the inquiry at the initial phase of determining whether a candidate is "otherwise qualified" is on the employer's decision and what medical information was available to support that decision and whether the decision reflects reasoned decisionmaking.[2]

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[2] That the focus in *Arline* was on the reasonableness of the employer's decision in light of "reasonable medical judgments" is revealed by the Court's discussion in footnote 18, where it leaves open what deference is owed by a court to an employer's decision

This describes precisely what Northwestern did in this case. The University did not respond reflexively to petitioner's condition. First, it voluntarily fulfilled its oral commitment to provide petitioner with a full athletic scholarship, regardless of his medical condition. Second, the University arranged for petitioner to be examined by the team physician, who made a recommendation based on the examination, the patient's history, generally available information about petitioner's condition, and recommendations from other consulting physicians. See *supra* p. 3. In deferring to the team physician's judgment Northwestern followed its previously published guidelines that medical eligibility for participation in intercollegiate athletics is left strictly to the judgment of the team physician. See *supra* pp. 2-3. Finally, the consensus and repeated recommendation of a national conference of specialists in this field concluded that athletes with petitioner's condition should not be declared eligible to participate in "moderate and high intensity competitive sports," which includes basketball. Pet. App. A-3 to A-4 n.2. In sum, the University's decision plainly was not the product of prejudice or ignorance and does not run afoul of the standards in *Arline*.

B. Even less persuasive is petitioner's assertion (Pet. 12-14) of a conflict among the circuits. The primary case relied upon by petitioner (Pet. 12-13), *Mantolete* v. *Bolger*, 767 F.2d 1416 (9th Cir. 1985), specifically focused its analysis of "otherwise qualified" on the employer's reliance upon "all relevant information regarding . . . medical history . . . [in] assess[ing] both the probability and severity of potential injury." 767 F.2d at 1423. Indeed, the Seventh Circuit here relied upon *Mantolete* as support for its conclusion. Pet. App. A-16 to A-17.

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made solely in reliance upon the opinion of a private physician. 480 U.S. at 288 n.18. For reasons discussed *infra*, this case does not present the question the Court left open in *Arline*.

Petitioner argues that the court below erred in ignoring the reference in *Mantolete* to *de novo* review. Pet. 12-13 & n.5. It is petitioner, not the court below, that has misread *Mantolete*.

As the Ninth Circuit there explained, in deciding whether § 501 of the Rehabilitation Act, 29 U.S.C. § 791,[3] is violated, there is a two-step inquiry on the issue of whether an individual is qualified. First, the plaintiff must demonstrate that he is "qualified to perform the essential requirements of the job without a reasonable probability of substantial injury to the [plaintiff] . . . ." 767 F.2d at 1423. If plaintiff fails to make that showing, then the second issue is whether reasonable accommodations can be made by the employer to permit the plaintiff to perform adequately and safely. *Id.*

This case involves solely the question of petitioner's basic ability to play intercollegiate basketball without causing harm to himself. The reference to *de novo* review by the court in *Mantolete,* however, arises in its discussion of the reasonable accommodation issue. Moreover, the strict standard of review is derived at least in part from regulations relevant only to federal employers that impose a higher duty on governmental employers to accommodate disabled workers. *Id.* at 1423; see *supra* note 3. Thus, *Mantolete* does not address the issue of *de novo* review of the issue in this case. Accordingly, *Mantolete,* which in any event is a pre-*Arline* decision, in no way conflicts with the holding here to rely upon the University's reasonable judgment concerning petitioner's qualification to play varsity basketball based on clear evidence of a significant medical risk. See *Wood* v. *Omaha Sch. Dist.*, 25 F.3d 667, 669 (8th Cir. 1994)

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[3] As the concurring opinion in *Mantolete* explained, § 501, which applies to federal employees, imposes more significant burdens on the federal government as an employer than § 504 imposes on private employers. 767 F.2d at 1425 (Rafeedie, J., concurring).

(applying *de novo* review to question of reasonable accommodations).

It is far from clear what the Ninth Circuit meant by *de novo* review even if it had intended to apply the term in a context like the one presented here. Another case cited by petitioner (Pet. 13) suggests the correct analysis, which is fully consistent with the Seventh Circuit's approach. In *Doe* v. *New York University*, 666 F.2d 761, 776 (2d Cir. 1981), the court expressly recognized that under the statute it must "make the final determination," but in reaching that determination, the court still should accord "considerable judicial deference" to medical judgments unless there is reason to believe that someone acted improperly. This is precisely how the Seventh Circuit analyzed the issue. It did not abdicate its responsibility to make certain that Northwestern properly relied upon significant and legitimate medical evidence and opinion in deciding what was proper, but the court also did not substitute its judgment for University officials who acted responsibly. In sum, there is no conflict among the courts of appeals on the question presented by petitioner.[4]

C. Petitioner argues that this Court in *Arline* expressed doubt about whether in the employment setting judicial deference is appropriate to the judgment of an employer who relies upon a private physician's advice. Pet. 14-15; *Arline*, 480 U.S. at 288 n.18. In the first place, the footnote makes plain that the focus in *Arline* is on the judgment of the employer or the grant recipient, which should preclude *de novo* judicial scrutiny. See *supra* note 3.

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[4] Petitioner relies heavily (Pet. 10-11) upon a district court decision that criticizes the Seventh Circuit's ruling. *See Mendez* v. *Gearan*, 1997 U.S. Dist. LEXIS 1594, at *20 & n.9 (N.D. Cal. Feb. 13, 1997). The district court does not assert any conflict between the circuits. Indeed, it also reads *Mantolete* for the proposition that what the employer reviewed in making its decision is "important." *Id.* The fact that a single judge otherwise has criticized the approach followed by the court below creates no basis for *certiorari*.

Second, this is hardly the typical case where an employer seeks to justify an adverse employment action by citing some private physician's opinion. The University would like nothing more than to have petitioner play basketball. That was the reason he was offered a scholarship. The reason he is not playing basketball is not because of ignorance or prejudice; it is because the team physician who is invested with sole authority to make the eligibility decision strictly on medical grounds has reasonably concluded that petitioner is not medically fit to play.

Whatever the proper course for a court to follow in the far more typical situation where an employer pretextually seeks to justify adverse action toward an unwanted employee by reference to a physician's opinion, here there is no serious doubt that the University relied upon physicians acting independently, in good faith and in conformity with the consensus recommendation of experts in this precise field and who had studied this precise problem. This case simply does not present the problem the Court was concerned about in *Arline*.

D. Finally, petitioner distorts the opinion below by suggesting that the court itself acknowledged that it will "be the 'rare case' . . . where a disabled" athlete "will be able to attack an exclusion decision." Pet. 16 (quoting Pet. App. A-20 to A-21). That is not what the court of appeals said. What the court said is that when a federal fund recipient makes an exclusion decision that is "individualized, reasonably made, and based upon competent medical evidence," Pet. App. A-20, then it will be a rare case where the court will be permitted to substitute its judgment and find the Rehabilitation Act violated. That statement is not only unquestionably accurate, but also reveals that the court of appeals has not adopted a rule that slavishly defers to exclusion decisions. Instead, the court of appeals quite properly accords those decisions significant respect in circumstances posed here

where the University has made a reasonable choice given the state of knowledge about the risks of petitioner's medical condition. That is all that the Rehabilitation Act as interpreted by this Court in *Arline* requires.

2. The court of appeals alternatively held that petitioner's inability to play intercollegiate basketball does not substantially limit a major life activity—education. Accordingly, the court held that petitioner is not "disabled" within the meaning of the Act. Pet. App. A-14.

Petitioner derides (Pet. 18) the court of appeals' analysis by describing as "absurd[]" the conclusion that he is not entitled to the protections of the Act. But, that is not what the court of appeals held. The court of appeals, based on how the "parties here have framed their arguments," (Pet. App. A-8) focused on whether playing an intercollegiate sport is integral to the major life activity of obtaining an education. Thus, if petitioner had been excluded from some non-sports activity based on his heart condition, the court of appeals would not have held that he is not protected by the Rehabilitation Act. It is disingenuous of petitioner to suggest otherwise.[5]

Finally, petitioner argues (Pet. 22-27) that the court of appeals erred in not affirming the district court on the facts of this case. That, of course, is an inherently fact-bound issue that plainly does not warrant review by this Court. Moreover, the court of appeals' analysis is unassailable. The court was unquestionably correct that "the inability to play intercollegiate basketball at Northwest-

[5] Petitioner also complains (Pet. 21-22) that the court of appeals failed to consider other elements in the regulations defining a disability, such as whether the individual has a "record of impairment" or is perceived as impaired. 34 C.F.R. § 104.3(j)(1)(ii). But the court of appeals did not discuss these issues because the parties framed the issue in terms of the importance of intercollegiate sports to the major life activity of obtaining an education. Having asked the court to answer one question that fully resolves the issue, petitioner can hardly fault the court for declining to answer other questions that would not.

ern forecloses only a small portion of [petitioner's] collegiate opportunities." Pet. App. A-13 to A-14 (footnote omitted). It certainly cannot be argued persuasively that intercollegiate basketball generally is essential to a college education. And petitioner does not make that claim.

Instead, petitioner argues (Pet. 25-26) that he is entitled to an individualized determination of the importance of intercollegiate athletics to him and his education. Petitioner acknowledges that the law in the Seventh Circuit is that ordinarily the individual's "expectations" are important in deciding the question of "disability." *Id.* at 26 (citing *Homeyer* v. *Stanley Tulchin Assocs., Inc.*, 91 F.3d 959, 962 (7th Cir. 1996)). Thus, the issue reduces to whether an unreasonable, subjective expectation is alone sufficient to support a finding that an exclusion substantially interferes with a major life activity. Petitioner cites no case to support such a sweeping proposition and that question, which involves merely an alternative holding of the court below, clearly does not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Supreme Court, U.S.
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No. 96-1622

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NICHOLAS KNAPP,

Petitioner,

v.

NORTHWESTERN UNIVERSITY, an Illinois not-for-profit corporation, and RICK TAYLOR,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

I. THE COURT SHOULD GRANT THE PETITION FOR A WRIT OF CERTIORARI BECAUSE THE SEVENTH CIRCUIT'S DECISION ALLOWING FOR THE EXCLUSION OF A DISABLED PERSON WHO IS ABLE TO MEET, WITH OR WITHOUT REASONABLE ACCOMMODATION, ALL OF A PROGRAM'S REQUIREMENTS CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS.

Nicholas Knapp is an "otherwise qualified" disabled person since he is able to meet all of the requirements of Northwestern University's intercollegiate basketball program in spite of his perceived handicap. *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979). At trial, several nationally known cardiologists testified that playing basketball does not create a significant risk of injury for Knapp and why the "Bethesda Conference" guidelines do not apply to him, now almost three years after his cardiac event. The district court agreed and found that Knapp's playing basketball does not place him at substantial risk and entered an injunction in his favor. Pet. App. C - F. The Seventh Circuit has not suggested that the trial court's factual findings were clearly erroneous. *See Wood v. Omaha Sch. Dist.*, 25 F.3d 667 (8th Cir. 1994) (affirming district court on ground that findings concerning risk of harm to others were not clearly erroneous).

Because of the Seventh Circuit's decision, Knapp remains a perpetual observer. Yet, not one decision of any circuit court supports the Seventh Circuit's minority rule that the trial court should not decide whether a disabled

person satisfies the test enunciated in *Southeastern Community College*, but rather is to determine only whether the federal grantee acted in good faith in reaching an incorrect decision about future risk of injury.

The only decision the Seventh Circuit cites to support its position (Pet. App. A-16), *Mantolete v. Bolger*, 767 F.2d 1416 (9th Cir. 1985), actually conflicts with that court's decision. Pet. 12-13. Even Northwestern appears grudgingly to admit that *Mantolete* is inconsistent with and does not support the Seventh Circuit's ruling. Northwestern initially flirts with the theory (Resp. 9-10) that somehow *Mantolete* applies only to the issue of reasonable accommodation, while ultimately conceding (Resp. 10), as it must, that the Ninth Circuit intended that the trial court weigh all of the evidence, without deference to either side's private physicians, in determining whether sufficient risk of future injury exists to justify exclusion, regardless of the availability of accommodation.[1]

The Seventh Circuit's decision also conflicts with the Eighth Circuit's opinion in *Wood v. Omaha School Dis-*

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[1] *Mantolete* remains the law of the Ninth Circuit as to a Section 504 (29 U.S.C. § 794(a)) claim. *See Mendez v. Gearan*, 1997 U.S. Dist. LEXIS 1594 at 20 n. 9 (N.D. Cal. February 13, 1997) (citing *Mantolete* in criticizing the new standard which the Seventh Circuit has created). Northwestern's assertion (Resp. 9-10) that *Mantolete* does not apply to a Section 504 claim is contradicted by the Seventh Circuit's reliance upon it, and by the decisions of other circuits. *See, e.g., Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991) (citing *Mantolete*, no difference between Section 501 and Section 504 standards as to issue of "otherwise qualified" except that Section 501 imposes an affirmative duty on federal employers to accommodate handicapped individuals).

trict, 25 F.3d 667 (8th Cir. 1994). There, the district court denied a claim by insulin-dependent diabetics that they were wrongfully excluded from the position of school bus driver. The parties each presented medical testimony concerning the risk of harm arising from the plaintiffs' disability. In affirming the district court's factual finding in favor of the employer that the risk to others was unacceptable, the Eighth Circuit stated (25 F.3d at 669):

> The evidence supports the finding that [plaintiffs] are poorly controlled diabetics and are thus in danger of problems from hypoglycemia or hyperglycemia. Although Dr. Duckworth's conclusions were contradicted by the testimony of Dr. Ratner, we cannot say that the district court clearly erred in crediting Dr. Duckworth's opinions over Dr. Ratner's contrary testimony.

Here, the district court credited Knapp's physicians' testimony over that of Northwestern's hired experts. If the Seventh Circuit had followed *Wood*, it would have affirmed the district court since the factual finding of no substantial risk was not clearly erroneous. Instead, the Seventh Circuit not only ignored *Wood*, but also the other circuit court and district court decisions which have ruled that the trial court should weigh the conflicting medical testimony on risk without deference to either side's private medical physicians. Pet. 12-16 and cases cited therein.[2]

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[2] At a minimum, *certiorari* is appropriate to address the issue of the level of deference a trial court is to give to the opinions of private physicians upon whom a grantee relies, a question which the Court did not answer in *School Board of Nassau County v. Arline*, 480 U.S. 273, 288 n. 18 (1987). Northwestern's assertion (Resp. 8 n.2) that the instant case does not implicate this issue is mistaken.

Doe v. New York University, 666 F.2d 761 (2d Cir. 1981) (Pet. 13; Resp. 10) also does not support the Seventh Circuit. In that case, the Second Circuit made clear that if the only issue barring plaintiff from admission to the defendant's medical school was fear of future injury to plaintiff or to others as a result of a prior mental disability, it was for the trial court to determine whether she was "qualified" by "weighing the expert testimony on each side." *Id.* at 779. The Second Circuit's decision in *Doe* conflicts with the Seventh Circuit's decision as the Seventh Circuit has barred the trial court from considering the conflicting expert testimony of the parties' respective private physicians and from making an independent finding of fact as to the severity of the risk of participation.

When an exclusion decision is based upon the fear of future injury, it is axiomatic that a grantee cannot have acted in good faith or reasonably unless it relied upon competent medical evidence of substantial risk. Improper motive or bad intent, which can be discovered through examination of the process by which an exclusion decision was made, may be relevant to showing either a failure to rely upon reasonable medical evidence or exclusion for reasons other than disability (*i.e.*, pretext). However, even Northwestern does not dispute that a grantee cannot rely upon its alleged good faith or lack of discriminatory intent as a defense to a Section 504 claim. *Alexander v. Choate*, 469 U.S. 287, 294-301 (1985); Pet. 10, 14 n.7.[3] The Seventh Circuit, however, neglected to

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[3] *See Pushkin v. Regents of the University of Colorado*, 658 F.2d 1372 (10th Cir. 1981) (Whether grantee had rational basis for its decision is irrelevant to a Section 504 claim); *see also* Pet. App. F-3 to F-4.

consider *Choate* and has imposed a rule of law that allows a grantee to raise "the process" as a defense to such a claim, without regard to whether the disabled individual can actually meet a program's requirements.

Knapp does not seek preferential treatment. Instead, like other disabled persons, he seeks only the right Section 504 provides to him to live as normal life as possible and not to be deprived of that opportunity because a federal grantee that offers an activity incorrectly believes that there is a substantial risk he will injure himself if he participates.[4] *Certiorari* is called for here because limiting the trial court's inquiry to whether the grantee acted in good faith and without discriminatory intent conflicts with: 1) The explicit language of Section 504; 2) the Court's decisions in *Choate* and *Davis*, where the Court held that good faith and lack of bad intent are not defenses to a Section 504 claim, and that a disabled person who can perform an activity in spite of his alleged handicap is "qualified" under the Rehabilitation Act; and 3) the decisions of other circuit and district courts which have not deferred to the opinions of a federal grantee's private physicians in determining whether a future risk of injury is sufficient to support exclusion.

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[4] *See Mendez*, 1997 U.S. Dist. LEXIS 1594, at *20 n.9 ("if a decision-maker unnecessarily excludes an individual on the basis of a disability, that decision should be overturned, regardless of the sufficiency of the evidence upon which it was based").

II. THE TRIAL COURT'S ROLE IN ADDRESSING EXCLUSION DECISIONS BASED UPON FUTURE RISK OF INJURY DOES NOT PRESENT A "UNIQUE" QUESTION AND A DENIAL OF KNAPP'S PETITION WILL LEAVE CONFLICTING RULES OF LAW AS TO THE BASIS UPON WHICH *QUALIFIED* DISABLED PERSONS CAN STILL BE EXCLUDED FROM AN ACTIVITY.

Recognizing that the Seventh Circuit's opinion lacks precedential support and conflicts with all circuit court decisions and the overwhelming majority of district court decisions which have addressed the propriety of exclusion based upon risk of future injury, Northwestern seeks to avoid *certiorari* by isolating Knapp's case from those of other disabled persons. Northwestern contends this is an inappropriate case for review because it is "novel" and "unique"; it involves a "nonrecurring" issue; and that this "precise problem" will not recur "frequently." Resp. 6-7. Stated differently, the writ, according to Northwestern, should be denied because there probably will not be many lawsuits brought by disabled students with internal defibrillators who seek to play intercollegiate basketball.

Knapp's case, however, is not just about a student's right to play basketball; it is about the application of the Rehabilitation Act to the exclusion of persons due to risk of future injury based upon real or perceived disabilities. Knapp is no different than the plaintiff in *Arline*, who was banned from teaching because she had had tuberculosis; he is no different than the student who is prohibited from attending grammar school because he is HIV positive; he is no different than the person with AIDS who is denied medical treatment; he is no different than the insulin-dependent diabetic who seeks to become a

FBI agent or to drive a school bus; he is no different than the high school student with one kidney or one eye who is told by the school physician he cannot play football or wrestle. Pet. 12-16 and cases cited therein. Simply stated, claims under the Rehabilitation Act involving disabled persons who are excluded due to risk of future injury are very common, and are not "unique." Today, Northwestern tells Knapp that he "cannot do" because he had a cardiac episode in September 1994; tomorrow, an employer may deprive Knapp of a promotion because of a fear that stress will cause him to have a second event.

Northwestern tries to separate Knapp further from other disabled persons because Northwestern authorized its agent, a private "team physician," to make the exclusion decision.[5] Resp. 2-3, 6. This distinction falls flat since in almost all cases Knapp cites in his Petition, the federal grantee obtained medical evidence to support exclusion. The delegation of authority to a physician to decide or examine "future risk" should not immunize a

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[5] Northwestern's team physician is an orthopedic surgeon who was assisted by a university employed internist (who performed a perfunctory "school physical" of Knapp). Both are agents of the school. Neither physician has any cardiovascular expertise relevant to Knapp's condition and neither spoke with a cardiologist prior to the school's permanent exclusion of Knapp as an active member of its basketball program. Needless to say, Northwestern's assertion (Resp. 11) that "[t]he University would like nothing more than to have petitioner play basketball" is contradicted by its less than forthright conduct towards Knapp. Because the district court decided, with Northwestern's consent, that Knapp's request for permanent injunctive relief would only address his risk of participation going forward, and not the process by which Northwestern reached its exclusion decision, the parties never addressed the reasonableness of Northwestern's conduct at trial.

federal grantee from claims brought under the Rehabilitation Act. Yet, this is what the Seventh Circuit has improperly done by focusing the trial court's examination solely upon the "process" of exclusion. Regardless of *how* the decision is made, for a disabled person the result is still the same—the federal grantee has excluded that individual. The question presented is what rights under the Rehabilitation Act does the disabled person have to seek judicial relief from that decision.

Whether a disabled person can be barred from an activity because of fear of future injury has been and will continue to be addressed frequently. The conflict between the circuit courts as to the role of the trial court in deciding exclusion decisions of this type is appropriate for *certiorari* as the question is of importance to *all* disabled persons and is one that goes to the core of the Rehabilitation Act, which prohibits the exclusion of "otherwise qualified" disabled persons.

CONCLUSION

For all of the foregoing reasons, petitioner Nicholas Knapp respectfully requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully submitted,

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